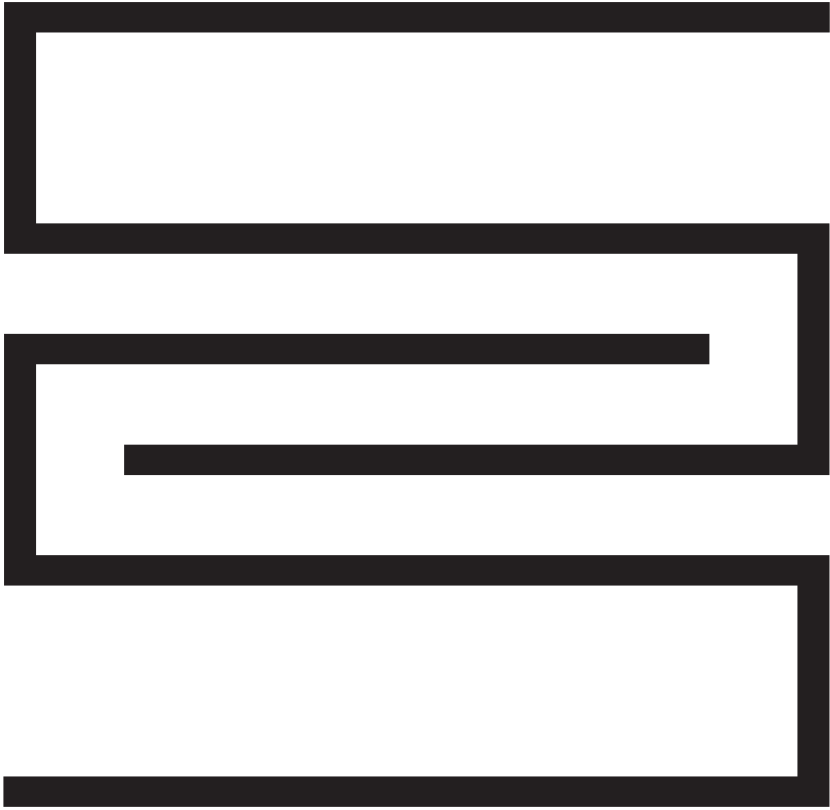


# **The Method of Interpretation of Penal Norms in the International Context**



**Dominik Zajqç**







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Kraków 2019

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This short book presents the results of over two years of research on extraterritorial jurisdiction in criminal law, conducted at the Jagiellonian University as part of my doctoral studies. Its focus is on the method of interpreting the penal norms in the international context. For the first time, it was discussed in my dissertation, published in Polish under the title *Odpowiedzialność karna za czyny popełnione za granicą* (Kraków 2016).

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Kraków 2019

## Introduction<sup>1</sup>

Mr John Doe, a citizen of state X and a multimillionaire, has a serious heart problem. He needs an immediate transplant to survive. Unfortunately, the law of state X prohibits any kind of organ trafficking. Because of that fact, Mr Doe decides to travel to state Y, where such transactions are legal. What is more, under the provisions of Y's law, it is allowed for a living person whose family is destitute to sell his or her organ and such a transaction could provide for the maintenance of the children of the donor until they become adults. Mr Doe finds such a person, a citizen of state Y, and makes a deal – he pays for euthanasia and transplantation and comes back to his country in good health.

The above short story raises a question: “What shall state X do with Mr Doe upon his arrival?” Is everything correct? Can we, as a society, agree to such a patently criminal act which deserves condemnation? Should we try to fight them by domestic policy? Does the state have any authority over social situations that occur abroad? The answer to these questions is not simple and depends on factors specific to each situation.

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<sup>1</sup> The book was written as part of the research project “Criminal liability for acts committed abroad. Historical, philosophical and normative aspects” funded by the National Center for Science under Decision DEC-2013/11/N/ HS5/04238. The work is a translation of selected theses, contained in the following book: Dominik Zając, *Odpowiedzialność karna za czyny popełnione za granicą* [*Criminal Responsibility for Acts Committed Abroad*] (2017).

Further consideration contains the argumentation for the thesis that every state possesses wide competence to punish acts committed abroad. This competence is limited only by the duty of protection of values commonly respected internationally<sup>2</sup>. This article presents a method of interpreting norms of national substantive criminal law<sup>3</sup> in the international context, taking into account the achievements of Polish doctrine and theory of criminal law.

According to the assumption underpinning these considerations, the subject in the focus of criminal law is not the ontological concept of a perpetrator's behaviour, but an individual's act that violates a norm. It is only after a given activity or omission is proven to be unlawful that an act can be further verified in terms of its punishability. To simplify, for the state to be able to punish for something, it has to prohibit it first. Such an approach to the issue of criminal liability requires specifying the contents of the norm that is binding on the perpetrator at the time of his or her action or omission<sup>4</sup>. The state has to give Mr Doe a chance to recognize the content of the norm. Because of that fact, the traditional model of criminal jurisdiction, which is based on principles of jurisdiction (i.e. the protective principle or principle of nationality)<sup>5</sup> is no longer adequate. In international or cross-border context, it is inextricably linked to the problem of validity of law in space. Considering the absence of relevant general principles adopted at the constitutional level, this issue has to be settled using the *acquis* of the theory of law and international public law.

The work is arranged into two main sections, which are further divided into parts. The first one – background section – constitutes a brief presentation of the conceptions of limitation of the state's powers, the theory of conjugated norms and the method of normative analysis. The second one contains the presentation of the method of practical interpretation of penal norms in the international context.

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2 Such approach is represented also in American doctrine of criminal law. See: Charles Doyle, *Extraterritorial Application of American Criminal Law*, *Congressional Research Service Report*, October 31, 5 (2016), <https://fas.org/sgp/crs/misc/94-166.pdf>.

3 The subject matter of this study is constituted by only substantive (not procedural) legal norms – see: Friedrich V. Kratochwil, *Rules, Norms, and Decisions. On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*, 186 (Cambridge 1989); George P. Fletcher, *Basic Concepts of Criminal Law*, 7–14 (Oxford University Press 1998).

4 John M. Darley, Kevin M. Carls Smith, Paul H. Robinson, *The Ex Ante Function of the Criminal Law*, 35 *Law & Soc'y Rev.* 166 (2001).

5 See: Doyle, *supra* note 2, at 13–15.

## Background

The binding effect of legal norms, as well as the standard-setting expressions that comprise these norms, have its source in a decision of the state as a law-making entity<sup>6</sup>. Determining the spatial limits of being in force and the application of penal norms requires discussing two issues that together will form the basis of further argumentation. Firstly, it is necessary to indicate which categories of state competence describe the right to define and apply penal norms and what factors affect their spatial extent. Secondly, it seems important to carry out the characteristics of penal norms, taking into account the achievements of Polish theory and dogmatics of criminal law. For these reasons, the background section is divided into two parts. The first part concerns the issue of state power and its limitation, and the second contains the description of the structures of penal norms and an explanation of the so-called theory of conjugated norms.

### 1. The state's power and its limitation

It is the state which shapes social relations in a specific manner, deriving its competencies in this area from sovereignty<sup>7</sup>. However, its authority

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<sup>6</sup> George C. Christie, *Law, Norms and Authority*, 2 (1982).

<sup>7</sup> It is reflected in the caselaw of the ICJ, especially in the case of the S.S. LOTUS (France v. Turkey) P.C.I.J., Ser. A, No. 10. (1927): "It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which

is substantially limited. Here, two key limiting factors<sup>8</sup> ought to be indicated: the sovereignty of other states<sup>9</sup> and the need to respect values protected under international law, especially human rights<sup>10</sup>. All activities

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it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable". See: Jerzy Kranz, *Suwerenność państwa i prawo międzynarodowe* [State Sovereignty and International Law] in *Spór o suwerenność* [Dispute Over Sovereignty] 110 (Waldemar J. Wołpiuk ed., 2001); Jerzy Kranz, *Państwo i jego suwerenność* [The State and Its Sovereignty], 617 *Państwo i Prawo* 7 (1996); Cedric Ryngaert, *Jurisdiction in International Law* 22–26 (ed. 2d, Oxford University Press 2015); Christopher Greenwood, *Sovereignty: A View from the International Bench*, in: *Sovereignty and the Law: Domestic, European and International Perspectives* 258 (Richard Rawlings, Peter Leyland & Alison Young ed., Oxford University Press 2013); Roman Kwiecień, *Teoria i filozofia prawa międzynarodowego* [Theory and Philosophy of International Law] 115 (2011); Roman Kwiecień, *Państwo i jego suwerenność a prawo międzynarodowe jako system prawa* [The State and Its Sovereignty and International Law as a System of Law], in *Państwo a prawo międzynarodowe jako system prawa* [The State and International Law as a System of Law] 50–54 (Roman Kwiecień ed. 2015); Tomasz Ostropolski, *Zasada jurysdykcji uniwersalnej w prawie międzynarodowym* [Principle of Universal Jurisdiction In International Law] 52–55 (2008).

- 8 The doctrine of international law knows the term "negotiating sovereignty", which defines the process of weighing sovereignty and other values recognized in the international community. See: Sonia Cardenas, *Sovereignty Transformed? The Role of National Human Rights Institutions*, in: *Negotiating Sovereignty and Human Rights. Actors and Issues in Contemporary Human Rights Politics* 34–35 (Noha Shawki & Meacheline Cox ed., Padstow 2009).
- 9 Olivier De Schutter, *Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations*, Business & Human Rights Resource Centre 2006, 25–28, <http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf>.
- 10 Anthony D'Amato, *Jurisprudence. A Descriptive and Normative Analysis of Law* 204–209 (Springer 1984); Wojciech Burek, *Zastrzeżenia do traktatów z dziedziny praw człowieka* [Objections to Treaties in the Field of Human Rights] 45 (2012); Anne Clunan, *Redefining Sovereignty: Humanitarianism's Challenge to Sovereign Immunity*, in: *Negotiating Sovereignty and Human Rights. Actors and Issues in Contemporary Human Rights Politics* 7–27 (Noha Shawki & Meacheline Cox ed., Padstow 2009). The author points out that the progressive limitation of sovereignty at the level of law is in fact the consequence of social change and, in essence, merely constitutes the legalization of

undertaken by the state, both in the area of enactment and application of the law, must remain within these specified limits.

The aim of this paper is to indicate a method of interpreting penal norms in the international context, so it seems particularly significant to determine spatial limits for two categories of powers: legislative jurisdiction<sup>11</sup> and the right to punish (*ius puniendi*). The need to consider the topic simultaneously from both perspectives is determined by the dual nature of penal norms. On the one hand, these norms govern the behaviour of the addressees, while on the other, their main objective is to determine conditions a punishment has to meet to be imposed on the perpetrator. This approach determines the way in which the scope of the standard-setting competence is established for specific directival expressions included in the norm. Those that are of a more regulatory nature depend primarily on the limits of the standard-setting powers. Others that pertain to the measure of penalty are more linked to the limits of the right to punish.

In both cases, determining any precise limits is very difficult, if not impossible. No unambiguous solutions are set forth in this regard by international law, whereas individual states pursue maximisation rather than a limitation of their own powers. In this perspective, the disquisition presented below ought to be considered more as a collection of certain validation arguments that support either recognition or negation of the competencies of a given state, rather than as a description of regulations of imperative nature.

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the facts; see also: Jean L. Cohen, *Globalization and Sovereignty. Rethinking Legality, Legitimacy, and Constitutionalism* 159–178 (Cambridge University Press 2012); Oona A. Hathaway, *International Delegation and State Sovereignty*, 71 *Law & Contemp. Probs.* 145–148 (2008); Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* 125 (Princeton University Press 1999); Robert Jackson, *Sovereignty: The Evolution of an Idea* 114–134 (Cambridge University Press 2007). This tendency has been reflected in ICTY jurisprudence – see e.g.: *The Prosecutor v. Dusko Tadic a/k/a/"Dule"* (*Decision on the Defence Motion or Interlocutory Appeal on Jurisdiction*), Case No. IT-94-1-AR72, ICTY, 2 October 1995.

11 Marek Wasiński, *Jurysdykcja legislacyjna państwa w prawie międzynarodowym publicznym* [*The Legislative Jurisdiction of the State in Public International Law*], 673 *Państwo i Prawo* 57 (2002); Willis L.M. Reese, *Legislative Jurisdiction*, 78 *Colum. L. Rev.* 1587 (1978); Austen L. Parrish, *Evading Legislative Jurisdiction*, 87 *Notre Dame L. Rev.* 1677 (2013); John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 *Am. J. Int'l L.* 355 (2010); John H. Knox, *Legislative Jurisdiction, Judicial Canons, and International Law*, 100 *Wake Forest Univ. Legal Studies Paper No.* 1349127, 2 (2009).

### 1.1. The limits of legislative jurisdiction

The power of the state to set standards for specific social situations is referred to as legislative jurisdiction. Like every competence of the state, the norm-setting power is also derived from sovereignty. The fact that sovereignty is an attribute of the state as a political entity gives rise to significant consequences for spatial limits of the effectiveness of norms. The commonly recognised essential elements of the state are the territory, the people, and the authority exercised over the people<sup>12</sup>. Sovereignty is not linked expressly to any of the above elements but to the state in general<sup>13</sup>. At the same time, sovereignty serves as the source of the presumptive competence in regard to matters concerning the state<sup>14</sup>. In this perspective, the term “matters concerning the state” cannot be limited to situations occurring within its borders. “Matters concerning the state”

12 Defining the state by the triad: authority, territory, population has its roots in the peace treaties ending the Thirty Years War. The most important were signed in Munster and Osnabuck in 1648 – they created Model of Westphalian Sovereignty – Roman Kwiecień, *Suwerenność państwa. Rekonstrukcja i znaczenie idei w prawie międzynarodowym* [State Sovereignty. Reconstruction and the Importance of the Idea in International Law] 23–25 (2004). See also: Kranz, *Państwo*, *supra* note 7, at 4; Teresa Łoś-Nowak, *Pozycja państwa w systemie międzynarodowym i odgrywane role* [The Position of the State in the International System and Roles Played], in *Pokój i sprawiedliwość przez prawo międzynarodowe. Zbiór studiów z okazji sześćdziesiątej rocznicy urodzin Profesora Janusza Głasa* [Peace and Justice Through International Law. a Collection of Studies on the Occasion of the Sixtieth Anniversary of the Birth of Professor Janusz Głós] 194–196 (Cezary Mik ed., 2007); John A. Cohan, *Sovereignty in a Postsovereign World*, 18 Fla. J. Int'l L. 919–925 (2006); Diane P. Wood, *The Structure of Sovereignty*, 18 Lewis & Clark L. Rev. 217 (2014); Martin Loughlin, *Why Sovereignty? Sovereignty and the Law: Domestic, European and International Perspectives* 44 (Richard Rawlings, Peter Leyland & Alison Young eds., Oxford University Press 2013); Jan Białocerkiewicz, *Prawo międzynarodowe publiczne. Zarys wykładu* 149 [Public International Law. Outline of the Lecture] (2005); Jerzy Tyranowski, *Integralność terytorialna, nienaruszalność granic i samostanowienie w prawie międzynarodowym* [Territorial Integrity, Inviolability of Borders and Self-Determination in International Law] 11 (1990); Aniela Dylus, *Suwerenność państwa narodowego na tle współczesnych procesów gospodarczych* [The Sovereignty of the Nation State Against the Background of Modern Economic Processes], in: *Suwerenność państwa i jej granice* [The Sovereignty of the State and Its Borders] 183–197 (Sławomir Sowiński&Janusz Węgrzecki eds., 2010); Julian Ku, John Yoo, *Globalization and Sovereignty*, 31 Berkeley J. Int'l L. 227–232 (2013).

13 It should be pointed out, however, that there are also conceptions that merge sovereignty exclusively from the territory, see: Ryngaert, *supra* note 7, at 28–31, 44.

14 In the scope of this study, the term “matters concerning the state” is used to distinguish it from the “internal affairs of the state”, which refers to the category of cases that fall under the exclusive competence of the state.

are also matters of its citizens and matters related to the organisation of its operations<sup>15</sup>.

By means of its authorities, the state exercises its responsibilities and powers in respect of the territory and the people. The above-mentioned duality seems noteworthy. Not only does the state have the power to set norms of conduct with regard to its citizens and individuals within its territory, but it also has the responsibility to undertake actions that secure the rights of these persons and the area subject to the state against illegal infringements<sup>16</sup>. This is reflected in international law.

### 1.1.1. Jurisdictional nexuses as arguments justifying competencies of the state

The state refers to the territorial scope of legislative jurisdiction using the concept of a genuine connection<sup>17</sup>. In line with its key assumption, the argument in favour of granting competence to the state to regulate specific aspects of social life is the presence of significant nexuses<sup>18</sup> that refer to the territory, personal proximity or rights that remain under the protection of the state<sup>19</sup>.

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<sup>15</sup> Łoś-Nowak, *supra* note 12, at 196.

<sup>16</sup> Ryngaert, *supra* note 7, at 152.

<sup>17</sup> Wasiński, *supra* note 11, at 64; Ryngaert, *supra* note 7, at 146. The theory of the genuine connection was reflected in the *Nottebohm* case, where it was indicated: "A State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States. The requirement that such a concordance must exist is to be found in the studies carried on in the course of the last thirty years upon the initiative and under the auspices of the League of Nations and the United Nations. It explains the provision which the Conference for the Codification of International Law, held at The Hague in 1930, inserted in Article I of the Convention relating to the Conflict of Nationality Laws, laying down that the law enacted by a State for the purpose of determining who are its nationals 'shall be recognized by other States in so far as it is consistent with international custom, and the principles of law generally recognized with regard to nationality'. In the same spirit, article 5 of the convention refers to criteria of the individual's genuine connections for the purpose of resolving questions of dual nationality which arise in third states" – *Nottebohm Case* (second phase), Judgment of April 6th, 1955, I.C.J. Reports 1955.

<sup>18</sup> Wasiński, *supra* note 11, at 61; Knox, *Legislative*, *supra* note 11, at 102; Gabriel Hallevy, *A Modern Treatise on the Principle of Legality in Criminal Law* 90–91 (Springer 2010).

<sup>19</sup> Wasiński, *supra* note 11, at 61.



A competence based on a nexus in the form of a territory of a given state should be considered fundamental<sup>20</sup>. The territory is the most durable and unambiguous determinant of the limits of state authority. It does not usually undergo any transformations and is unambiguously defined in space. Considering values such as legal certainty or presumed familiarity with norms, it should be assumed that, as a rule, the law in force within a given territory is the law introduced by the governing state. This approach is reflected in international law, which recognises the precedence of the territoriality principle over the principle of personality. However, the said precedence is not related to the hierarchical order of rules, but has a functional character instead<sup>21</sup>. It introduces only a certain rebuttable presumption of state competencies in this regard, thus serving as a starting point for resolving competence disputes<sup>22</sup>. As long as no relevant evidence to the contrary is furnished, determining in a given case that one of the principles introducing solely extra-territorial validity of a norm is applicable, the presumed validity of a norm that is relevant in terms of territory is binding<sup>23</sup>. This does not mean in any way that the territoriality principle constitutes an overriding jurisdictional rule, but that in the course of the discourse it ought to be the prime consideration due to praxeological reasons.

When referring the above to the competencies related to setting norms that derive from sovereignty, one ought to note that here the territory is not as much a direct object for which the powers are exercised, but solely a criterion for determining the category of social situations regulated by the state which has authority over the said territory. Thus, one can distinguish the first category of behaviour for which the state has the power to set standards, i.e., any behaviour performed within the

<sup>20</sup> Kratochwil, *supra* note 3, at 84.

<sup>21</sup> Ryngaert, *supra* note 7, at 271; Florian Jessberger, W. Kaleck, *Concurring Criminal Jurisdictions under International Law*, The European Centre for Constitutional and Human Rights (ECCHR), 4, [https://www.ecchr.eu/en/documents/publications/legal-opinions/articles/the-responsibility-to-investigate-international-crimes.html?file=tl\\_files/Dokumente/Universelle%20Justiz/Expert%20Opinion%20Concurrent%20Jurisdictions%20en.pdf](https://www.ecchr.eu/en/documents/publications/legal-opinions/articles/the-responsibility-to-investigate-international-crimes.html?file=tl_files/Dokumente/Universelle%20Justiz/Expert%20Opinion%20Concurrent%20Jurisdictions%20en.pdf); *General principles of international criminal law*, ICRC Advisory Service on International Humanitarian Law, 4, <https://www.icrc.org/eng/assets/files/2014/general-principles-of-criminal-icrc-eng.pdf>.

<sup>22</sup> Knox, *A Presumption*, *supra* note 11, at 356.

<sup>23</sup> Ludwik Ehrlich, *Suwerenność a morze w prawie międzynarodowym* [*Sovereignty and the Sea in International Law*] 77 (1961).

territory of the state regardless of the actor<sup>24</sup>. Importantly, this pertains to the behaviour of an individual and not the result or any other consequential condition, since only behaviour is subject to standardisation.

The second category of nexuses refers to the personal proximity between the individual who exercises his or her behaviour and the state. In essence, the validity of a norm is determined here based on legal personality<sup>25</sup>. The attribute of sovereignty, which is assigned to the state as a whole, implies a presumption that the state has a sovereign competence over individual persons derived from the very fact that a person belongs to the state. Thus, the analysed proximity can have a formal character and comes down to the fact that a given person is recognised as a citizen of the forum state<sup>26</sup>, yet it can also refer to a factual relationship<sup>27</sup> – international law does not provide an unambiguous standard in this regard. In both cases, it constitutes a determinant of the existence of a given state's competence to standardise its actions.

Consequently, it can be said that the state has the right to exercise competencies in respect of that person regardless of his or her location. In this regard, the citizen of state Y somewhat extends the competencies derived from the sovereignty of state Y to include the behaviour performed by that person within the borders of state X that he or she is travelling across. At the same time, such a person enters a territory where state X exercises its competencies, which are also derived from its sovereignty. In this context, a conflict of competence may arise based on the sovereignty of both states and consist in a power to create norms that regulate the said person's conduct.

The third of the distinguished categories of nexuses that justify the state's claims to standardisation of specific matters is the nature of a legal right occurring in a given social situation. As noted above, the notion of competence, which is based on sovereignty, should be understood as not only the power to standardise given aspects of social life, but also the duty to take steps to ensure protection of legal rights of the state and

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24 Anthony Duff, *Responsibility, Citizenship and Criminal Law*, in: *Philosophical Foundations of Criminal Law* 143 (Anthony Duff & Stuart Green ed., Oxford University Press 2011).

25 Władysław Czapliński, Anna Wyrozumska, *Prawo międzynarodowe publiczne. Zagadnienia systemowe* [Public International Law. System Issues] 239–245 (2014); Białocerkiewicz, *supra* note 12, at 229–238; Ryngaert, *supra* note 7, at 90.

26 Czapliński & Wyrozumska, *supra* note 25, at 239–254; Duff, *supra* note 24, at 141.

27 Hallevy, *supra* note 18, at 92.

the persons who are subjected to the state due to their citizenship or the fact that they reside within its territory<sup>28</sup> and universal legal rights. This aspect of sovereignty is referred to by public international law as responsibility or a duty to protect<sup>29</sup>. In this approach, the state's sovereignty will serve as the grounds for a claim that state Y has the competence to regulate the behaviour of citizens of state X to the extent that they pertain to the legal rights protected by the state Y. Here, one ought to distinguish legal rights whose carriers remain within the territory of state Y<sup>30</sup>, legal rights of the citizens of the state Y regardless of their location, legal rights of national character that describe values significant from the view of proper functioning of the state, as well as universal legal rights determined by international law. This results from the fact that it is possible to indicate a certain catalogue of values protection which falls under the competence of each existing sovereign entity. The content of the said catalogue is not clearly established and constitutes the subject of disputes, which pertains both to the type of rights (dignity, life, health, natural environment)<sup>31</sup> and the type of infringements that may be prohibited and penalised by each state<sup>32</sup> regardless of the presence of a nexus (torture, slavery). In the article presented, the analysed condition, which constitutes, in fact, an autonomous jurisdictional nexus, was distinguished from the category of other jurisdictional nexuses referred to as classic nexuses.

28 Ryngaert, *supra* note 7, at 75.

29 Ryngaert, *supra* note 7, at 152.

30 See; *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-256-AAM, 2004 WL 2578982, at 12 (E.D. Wash. Nov. 8, 2004); Parrish, *supra* note 11, at 1681–1683.

31 On the environment as a legal good covered by international criminal law see: Wojciech Radecki, *Ochrona środowiska w polskim, czeskim i słowackim prawie karnym. Studium prawnoporównawcze* [Environmental Protection in Polish, Czech and Slovak Criminal Law. Comparative Law Study] 136–155 (2013). Interestingly, in the UN system, the natural environment is perceived by the prism of human rights and as such protected by them – see: Łukasz Boratyński, *Ochrona środowiska jako element międzynarodowej ochrony praw człowieka w systemie Narodów Zjednoczonych* [Environmental Protection as an Element of International Protection of Human Rights in the United Nations System], in *Wpływ standardów międzynarodowych na rozwój demokracji i praw człowieka* [Impact of International Standards on the Development of Democracy and Human Rights] 52–59 (Jerzy Jaskiernia ed., 2013); Peter G. Stoett, *Human Rights, Global Ecopolitics, and Contested Landscapes of Sovereignty*, in: *Negotiating Sovereignty and Human Rights. Actors and Issues in Contemporary Human Rights Politics* 182–191 (Noha Shawki & Meacheline Cox ed., Padstow 2009).

32 On the prohibition of torture as a norm of *ius cogens* see: *The Prosecutor v. Anto Furundzija* (Trial Judgement), Case No. IT-95-17/1-T, ICTY, 10 December 1998.

### 1.1.1. The rule of reason as a method of resolving conflicts of competence

The above-distinguished categories of nexuses constitute a potential cause of a claim regarding standardisation that may be filed by the state, but do not necessarily resolve all such claims. It might be the case that a given state limits the spatial scope of validity of specific regulations in the context of national law, e.g., with regard to the territory of the state<sup>33</sup> (this issue shall be analysed alongside a method for decoding sanctioned norms). At the very same time, a thoroughly reversed situation seems highly likely, where several entities are empowered to file *prima facie* claims to standardise a specific social situation. Conflicts may arise in this context, resulting in uncertainty regarding norms that are valid for individuals who undertake specified activities<sup>34</sup>. Nexuses may occur simultaneously and act in the same direction (a citizen of state X reveals its secret acting within a territory of the said state); however, they can also be in conflict (by acting within the territory of state X, a citizen of state Y violates the personal inviolability of a citizen of state Z)<sup>35</sup>. In practice, this oftentimes results in a concurrence of powers. The situation is further complicated by the fact that nexuses themselves constitute merely distinct arguments in the validation discourse – as indicated above, the only factors that limit the scope of the state's powers are the need to respect the sovereignty of foreign states and norms of international law. The demonstrated existence of jurisdictional nexuses serves in this case as an argument for the recognition of the forum state's powers to regulate specific social situations<sup>36</sup>. It is only a denial of the power to set standards that makes a person who is *prima facie* the addressee of a given norm incapable of being considered its addressee and thus not bound by that norm.

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33 Particularly noteworthy is the case of the US, whose legislation prescribes the so-called presumption against extrajurisdictionality/extraterritoriality, which limits the scope of each law exclusively to the territory of the United States, unless that presumption is broken by Congress's decision – see: Knox, *A Presumption*, *supra* note 11, at 351–396; William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 Berkeley J. Int'l L. 85–125 (1998).

34 Knox, *A Presumption*, *supra* note 11, at 358; Kranz, *Suwerenność*, *supra* note 7, at 131.

35 Ryngaert, *supra* note 7, at 127–128.

36 Ryngaert, *supra* note 7, at 32.

Considering the above, it seems necessary to determine the normative criteria for solving the concurrence of competencies to set standards. In each case, the actor should have the capacity to identify the norm he or she is bound to. Such an assessment must be possible *ex ante*, not later than upon the start of the behaviour. Otherwise, the norm will not be able to affect the behaviour of the perpetrator and, consequently, its fundamental function will not be fulfilled. The truth is that in practice, the problem of the transnational validity of norms takes on meaning only when a sanctioning norm or repressive administrative norms<sup>37</sup> are actualised, when each of the interested states makes effort to prove that the norms binding in a given case have been set up by its legislative body. This seems incompatible with the postulate of legal certainty and also violates the principle of punishing for behaviour incompatible with the norm of conduct. An individual who undertakes specific activities should be capable of identifying norms he or she is bound to as early as at the time of the act. The optimal solution here would be to indicate strict rules for determining the validity or the invalidity of a given norm and eliminating any doubt that may arise in this regard. Depending on the nature of normative expressions, there are various methods of determining the contents of a legally binding provision. In some cases, particularly where a given standard-setting expression is derived from civil law, the problem of concurring norms, which results from a concurrence of competencies to set standards, is solved through the commonly accepted conflict of law rules as described in private international law<sup>38</sup>. Nevertheless, public law lacks relevant conflict of law rules, whereas the issue of concurrent legislative jurisdictions must be solved by referring to the general principles of international law.

In the event of concurrent legislative jurisdictions, “the rule of reason”<sup>39</sup> serves as the starting point for determining the method of defining

37 Ryngaert, *supra* note 7, at 24–25.

38 However, it is important to point out the doubts as to the content of the conflict of law rules referred to herein. Firstly, not all of them are universally accepted by the international community. Secondly, they appear to limit the scope of applicability of the standard rather than its validity. From a criminal liability perspective, however, the dilemma is not relevant, and it is therefore not necessary to carry out a comprehensive analysis in this regard. – see: Wasiński, *supra* note 11, at 65.

39 Ryngaert, *supra* note 7, at 143. See: Michał Płachta, *Jurysdykcja państwa w sprawach karnych wobec cudzoziemców* [Jurisdiction of the State In Criminal Cases against Foreigners], 111/112 *Studia Prawnicze* 116–122 (1992); Doyle, *supra* note 2, at 5.

the limits of legislative jurisdiction. The rule allows one to specify the scope of legislative jurisdiction by means of self-limitation of states empowered to regulate specific relations with consideration of the rule of mutual respect<sup>40</sup> in international relations. The basic assumption of this rule is the existence of a possibility to determine the validity (or strength, for that matter) of a nexus between the regulated behaviour and the state that lays claim to standardisation. Thus, interests of individual entities concerned about the standardisation are at stake here, resulting in an acceptance of the legislative jurisdiction of one of these entities, while that of the other becomes denied<sup>41</sup>. This, in turn, renders the norm of the state whose power was denied invalid.

The rule of reason constitutes a general principle of international law<sup>42</sup>, which can be interpreted based on other commonly recognised basic principles. Thus, the rule of reason may be regarded as one of the regulations listed in the catalogue provided for in Article 38 of the Statute of the ICJ, consequently, a norm of international law<sup>43</sup>. The rule of rea-

40 Ryngaert, *supra* note 7, at 136–137.

41 Wasiński, *supra* note 11, at 64; Ryngaert, *supra* note 7, at 137.

42 Ryngaert, *supra* note 7, at 178–179. The argument put forward by Judge Gerald Fitzmaurice in the justification for the separate sentence in Barcelona Traction also seems to be in favour of the above solution: "It is true that, under present conditions, international law does not impose hard and fast rules on States delimiting spheres of national jurisdiction in such matters (and there are, of course, others – for instance, in the fields of shipping, 'anti-trust' legislation, etc.), but leaves States a wide discretion in the matter. It does, however, (a) postulate the existence of limits – though in any given case it may be for the tribunal to indicate what these are for the purposes of that case; and (b) involve for every State an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by its courts in cases of having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by, another State" – see: Barcelona Traction (Belg. v. Spain), 1970 I.C.J. 3 (Separate Opinion in the Judgment of Feb. 5).

43 United Nations, Statute of the International Court of Justice, 18 April 1946, the Art. 38: "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto." The doctrine of international law assumes that the above calculation is a closed catalogue of sources of international law. This is related to the so-called "compulsory jurisdiction of the ICJ", which is the result of the will of the parties but expressed *in abstracto*. More on this topic: Renata Szafarz, *Obowiązkowa*

son ought to be treated as an outcome of a joint interpretation of four principles of international law, whose binding status is beyond doubt: the principle of non-intervention, the equity principle, the principle of proportionality and the prohibition of abuse of law – combined with the requirement of legally relevant nexuses discussed above<sup>44</sup>. Nonetheless, none of them constitutes a precise directive of conduct. This translates into the general rule of reason, which shapes only a certain interpretive horizon without defining the exact limit of the spatial scope of legislative jurisdiction.

The first of the indicated principles of international law that comprise the general rule of reason is the principle of non-intervention in internal affairs of the state<sup>45</sup>. In a situation where power of state X based on the existence of a jurisdictional nexus remains concurrent with the exclusive competence of state Y, the latter effectively prevents the said power to be exercised by limiting the scope of the legislative jurisdiction of state X. This can be easily illustrated by a situation where a citizen of state X legally acquires access to classified information at the disposal of state Y. In the above situation, state X has no power to regulate its citizen's conduct even if the said citizen is within the territory of that state.

The principle of non-intervention in the area of exclusive powers is dictated by the Charter of the United Nations, whose Article 2(7) states as follows: “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII of the United Nations Charter”<sup>46</sup>. Moreover, a reference to

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*jurysdykcja Międzynarodowego Trybunału Karnego [The Compulsory Jurisdiction of the International Criminal Court]* 35–36 (1991).

44 Ryngaert, *supra* note 7, at 180.

45 Ryngaert, *supra* note 7, at 144; Simone Zurbuchen, *Vattel's Law of Nations and the Principle of Non-Intervention*, 31 *Grotiana* 69–84 (2010). Internal affairs of State X should be considered in any situation in which there is no significant nexus between the event and State Y at all, or in which the matter belongs to the exclusive competences of State X, and thus the fact that any significant nexus for state Y exists does not matter. See: Kranz, *Suwerenność*, *supra* note 7, at 118; Kranz, *Państwo*, *supra* note 7, at 22.

46 United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI; Emmanuel Y. Benneh, *Review of the Law of Non-intervention*, 7 *Afr. J. Int'l & Comp. L.* 140 (1995).



the exclusive area is also made by the Constitution of UNESCO<sup>47</sup> and the Pact of the League of Arab States<sup>48</sup>. The principle is also reflected in the case law of the ICJ<sup>49</sup>, which noted that the principle of non-intervention constitutes not only one of the fundamental principles of international law but is also irrevocable and immutable – both under a contract and through a new practice developed with the agreement of both parties<sup>50</sup>.

The implications of the recognition of the exclusive area refer expressly to the scope of norms' validity. State X will never be able to regulate those aspects of social life that are within the exclusive jurisdiction of state Y.

The second principle that serves as a component of the rule of reason is the equity principle<sup>51</sup>. The idea of equity is deeply rooted in public international law, which is reflected in the contents of individual rulings of international courts<sup>52</sup>. The equity principle is noted as one of the rules

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47 UN Educational, Scientific and Cultural Organisation (UNESCO), Constitution of the United Nations Educational, Scientific and Cultural Organisation (UNESCO), 16 November 1945, the Art. 1.3: "With a view to preserving the independence, integrity and fruitful diversity of the cultures and educational systems of the States Members of the Organization, the Organization is prohibited from intervening in matters which are essentially within their domestic jurisdiction".

48 Kwiecień, *supra* note 12, at 110.

49 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S. of America). Merits, Judgment. I.C.J. Reports 1986.

50 Nicaragua v. U.S. of America, *supra* note 49; Jianming Shen, *The Non-Intervention Principle and Humanitarian Interventions under International Law*, 7 Int'l Legal Theory 7 (2001). On differences in the perception of the sphere reserved in individual acts of international law see: Kwiecień, *supra* note 12, at 109–111, 146–151.

51 Varvara Coman, Luciana Boboc, Octavia Steriopol, *Equity, Fundamental Principle of Law*, 4 Contemp. Readings L. & Soc. Just. 462–469 (2012); Ruth Lapidoth, *Equity in International Law*, 22 Isr. L. Rev. 161–182 (1987).

52 North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), I.C.J. Reports 1969: "The Court comes next to the rule of equity. The legal basis of that rule in the particular case of the delimitation of the continental shelf as between adjoining States has already been stated. It must however be noted that the rule rests also on a broader basis. Whatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable. Nevertheless, when mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in considerations lying not outside but within the rules, and in this field it is precisely a rule of law that calls for the application of equitable principles"; *Diversion of Water from Meuse* (Netherlands v. Belgium), P.C.I.J. (ser. A/B) No. 70 (1937): "It must be concluded, therefore, that under Article 38 of the Statute, if not independently of that Article, the Court has some freedom to consider principles of equity as part of the international law which it must apply"; see also: *Corfu Channel Case*, I.C.J. Reports of Judgments, Advisory Opinions and Orders, Judgement of April 9th, 1949.



of law commonly recognised by civilised nations<sup>53</sup>. Therefore, it belongs to the catalogue provided for in Article 38 of the Statute of the ICJ, thus emphasising its commonly binding nature. The doctrine of international law considers the equity principle in the above meaning in three variants, granting or denying each of them the value of a norm of international law<sup>54</sup>. Firstly, it is noted that the equity principle can be treated as a norm that further specifies other regulations, since it is a distinctive interpretive directive. In this view, equity is not contrasted with the law, as in the case of decisions made *ex aequo et bono*, but becomes an immanent part of the system (*equity infra legem*)<sup>55</sup>. Secondly, the equity principle is considered a method for eliminating loopholes, allowing one to avoid a situation where in the absence of an *expressis verbis* rule of international law it is possible to settle an atypical case and to avoid a decision declared *non liquet*<sup>56</sup> (*praeter legem*)<sup>57</sup> by referring to the equity principle. Thirdly, the equity principle is sometimes considered an instrument that limits the application of the provisions of law and allows adopting a *contra legem*<sup>58</sup> interpretation. In the above case, the issue lies not in the application of law but in disabling the use of its norms. In the context of the analysed rule of reason, the first two functions of the equity rule, namely, equity *infra legem* and equity *praeter legem*, seem significant. Here, the equity rule constitutes an interpretive directive that allows one to determine the scope of the extra-territorial validity of regulations. Thanks to it the interests of individual entities that remain in dispute can be weighed and, thus, a decision that takes account (to a relevant extent) of the interests of all the parties involved can be issued. The subject with the power to standardise is the state which, in relation to the equity rule, has a stronger claim to setting standards in a given aspect of life.

The third component of the rule of reason is the principle of proportionality. Under public international law, it constitutes an instrument that allows interests of individual entities that remain in dispute to be

53 Subir K. Chattopadhyay, *Equity in International Law: Its Growth and Development*, 5 Ga. J. Int'l & Comp. L. 392 (1975); F. Francioni, *Equity in International Law...*; Czapliński & Wyrozumska, *supra* note 25, at 138–142.

54 Mark W. Janis, *The Ambiguity of Equity in International Law*, 9 Brook. J. Int'l L. 12 (1983)

55 Lapidoth, *supra* note 51, at 173.

56 Lapidoth, *supra* note 51, at 180; Chattopadhyay, *supra* note 53, at 397.

57 Lapidoth, *supra* note 51, at 173.

58 Lapidoth, *supra* note 51, at 174.

weighed with regard to their significance. It is based on weighing individual elements that are assessed in terms of their significance<sup>59</sup>. Where in the case of the equity rule the reference point applied in the assessment is equity in itself, when it comes to proportionality, the weights of individual interests or means are compared, revealing whether they are proportional to each other<sup>60</sup>. Viewed in this light, the principle of proportionality implies an order to adjust means to the objectives to be attained (the principle of adequacy of means, the principle of purpose)<sup>61</sup>. With respect to jurisdictional legislation, the principle of proportionality resolves itself to limiting the scope of competence of the state, since there is no need to set standards for specific aspects of social life<sup>62</sup>. In this case, the validity of norms would serve no purpose. In accordance with the principle of proportionality, it can be claimed that regardless of the way in which a given regulation meets the requirements of proportionality to the extent it standardises behaviour performed within the state borders, extending the scope of the norm beyond the territory of the said state is an infringement of international law. In this sense, the principle of proportionality constitutes a directive that orders an interpretation of national law that would allow the interpreted norms to fulfil their objectives and remain within its limits. This can be exemplified by the provisions of the construction law, energy law and road safety standards. Even if the wording of the very act does not specify if it is binding only within the territory of state X, the scope of its validity should be limited under the principle

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59 Ryngaert, *supra* note 7, at 148.

60 Ulf Linderfalk, *Towards a More Constructive Analysis of the Identity of Special Regimes in International Law – The Case of Proportionality*, 2 Cambridge J. Int'l & Comp. L. 857 (2013).

61 Paul Loftus, *The Rise and Rise of Proportionality in Public International Law*, 1 S. Cross U.L. Rev. 165 (1997); J. Beatson indicates that proportionality understood by EU law means: "reasonable relationship between the achieved and the means used to achieve it" – cit. for Loftus, *supra* note 61, at 181. Such proportionality should be distinguished from other meanings of the proportionality in penal law, including international penal law, which refers to the relation between the infringement of a particular prohibition and the sanction that is likely to violate it. See: Venus G. Baghi, T.R. Maruthi, *The Principle of Proportionality in International Criminal Law*, Acta U. Danubius Jur. 5–16 (2011); Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 Am. J. Int'l L. 753 (2008); Justyna Maliszewska-Nienartowicz, *Zasada proporcjonalności w prawie Wspólnot Europejskich* [*The Principle of Proportionality in the Law of European Communities*] 33–34 (2007).

62 Ryngaert, *supra* note 7, at 148.

of international law discussed above. The principle of proportionality and the equity rule share some common features<sup>63</sup> – in both cases, interests of entities that claim the power to set standards are weighed. Nevertheless, it is vital to adopt different views in the assessment.

The fourth element of the rule of reason is the prohibition of abuse of law. This concept introduces a prohibition against misusing one's powers. It has been adopted by the doctrine of public international law based on private law<sup>64</sup> and allows actions taken by the state, though within the limits of the law, to be blocked if they pursue objectives unacceptable in the light of internationally accepted values<sup>65</sup>. This norm is vague as well. Neither the case law of international courts nor the doctrine succeeded in developing commonly accepted criteria that would allow determining if, in a given situation, powers were abused and the principle of international law infringed. It is indicated that abuse of law may consist of bad faith of the actor, improper (unacceptable) purpose of the action, taking facts irrelevant to the case under consideration and the irrational nature of one's decision<sup>66</sup>. Such abuse can be exemplified by setting up norms valid outside the borders of a given state, whose actual intent, despite referring to one of the legally relevant nexuses (territory, citizenship, legal right), is to violate another state's interests.

The four principles of international law discussed above, which comprise the rule of reason, consequently limit the competencies of the state arising under sovereignty that determines the scope of legislative jurisdiction. In this regard, the rule of reason has the status of a metanorm N<sup>m</sup>, which further specifies the spatial validity of all other legal norms. Setting norms whose content transgresses thus determined limits ought to be

63 Ryngaert, *supra* note 7, at 150.

64 Ryngaert, *supra* note 7, at 150–151.

65 Ryngaert, *supra* note 7, at 151. See also: Georg Scharzenberger, *Uses and abuses of the "Abuse of Rights" in International Law*, 42 Transactions Year 147–179 (1956); Michael Byers, *Abuse of Rights: An Old Principle, A New Age*, 47 McGill L.J. 397–411 (2001–2002); the author cites numerous examples of the jurisprudence of international tribunals, treaties and statements of academics in which the principle of non-abuse of the law has been invoked.

66 Graham D.S. Taylor, *The Content of the Rule against Abuse of Rights in International Law*, 46 Brit. Y.B. Int'l L. 331 (1972–1973); United States (Chattin) v. United Mexican States, 22 A.J.I.L. 667 (Mexico-U.S. General Claims Comm'n) (1928) p. 282–312; Case Concerning Right of Passage Over Indian Territory (Portugal v. India) Merits, I.C.J. Reports of Judgments, Advisory Opinions and Orders, Judgment of 12 April 1960.

considered an infringement of international law (the sovereignty of other states protected under international law), which makes them invalid.

## 1.2. The limits of *ius puniendi*

The setting of penal norms in the broad sense is to some extent also related to exercising powers that comprise *ius puniendi*. This term is used to refer to competencies of the state to shape the domestic criminal law in a way that allows its objectives to be executed<sup>67</sup>. In this regard, Western legal culture distinguishes the following functions: justice function, protective function, guarantee function and compensatory function<sup>68</sup>. Therefore, the state has the right to punish the wrong due to the society's need to satisfy its sense of justice, in the name of which the state applies *ius puniendi*<sup>69</sup>. It exercises the *ius puniendi* to protect the people from criminal acts that it considers hazardous and harmful<sup>70</sup>. It specifies the response to the wrong and determines categories of conduct meriting condemnation. In this way the potential perpetrator knows which behaviour he or she can be punished for<sup>71</sup>. It shapes the mechanisms that allow the perpetrator to remedy the wrong inflicted on the society<sup>72</sup>.

67 Michael E. Bayles, *Principles of Law. A Normative Analysis* 281 (Springer 1987).

68 On the functions of criminal law: Fletcher, *supra* note 3, at 30; Jan Jodłowski, *Zasada prawdy materialnej w postępowaniu karnym. Analiza w perspektywie funkcji prawa karnego* [The Principle of Material Truth in Criminal Proceedings. Analysis in the Perspective of Criminal Law Functions] 248–312 (2015). See also: Christopher W. Mullins, Dawn L. Rothe, *The Ability of the International Criminal Court to Deter Violations of International Criminal Law: A Theoretical Assessment*, 10 Int'l Crim. L. Rev. 776–784 (2010); Wallace M. Rudolph, *Punishment or Cure: the Function of Criminal Law*, 48 Tenn. L. Rev. 543 (1980–1981); Hadar Dancig-Rosenberg, Tali Gal, *Restorative Criminal Justice*, 34 Cardozo L. Rev. 2324 (2012–2013); Peer Stolle, Tobias Singelstein, *On the Aims and Actual Consequences of International Prosecution of Human Rights Crimes*, in: *International Prosecution of Human Rights Crimes* 38–56 (Wolfgang Kaleck et al. eds., Springer 2007).

69 Jodłowski, *supra* note 68, at 261; Bayles, *supra* note 67, at 285; David Wood, *Retributive and Corrective Justice, Criminal and Private Law*, 48 Scandinavian Stud. L. 545, 547 (2005).

70 Rudolph, *supra* note 68, at 550; Jodłowski, *supra* note 68, at 254; Bayles, *supra* note 67, at 282.

71 Anthony Duff, *Retributive Punishment – Ideals and Actualities*, 25 Isr. L. Rev. 422, 431 (1991); Jodłowski, *supra* note 68, at 270.

72 Dancig-Rosenberg & Gal, *supra* note 68, at 2321; Kate E. Bloch, *Reconceptualizing Restorative Justice*, 7 Hastings Race & Poverty L.J. 203 (2010); Jodłowski, *supra* note 68, at 272;

By achieving the above-described objectives, the state protects specific legal rights of the victim, the perpetrator or the society as a collective, which are oftentimes in opposition to each other.

### **1.2.1.** Exercising criminal law functions as the essence of *ius puniendi*

In the view of substantive criminal law norms, execution of the right to punish consists in setting up binding prohibitions or orders requiring a given conduct subject to penalty. A question arises as to how the scope of validity of the said norms is formed if analysed in the framework of the scope of *ius puniendi* – i.e., the power to execute criminal law functions. When analysing the above against the issues of liability for crimes committed abroad one ought to note that the value attributed by a given society to specific legal rights under legal protection is culturally conditioned<sup>73</sup>. Actions that constitute an infringement of basic moral norms for one culture group remain acceptable for another. This pertains both to the behaviour of individuals themselves and to the forms of response to this behaviour presented by the state. Hence, to determine the limits of the right to punish, it seems necessary to analyse individual criminal law functions in the context of crimes committed abroad.

The first of the distinguished functions of criminal law is to ensure a proper standard of protection over social values; this takes place under criminal law by subjecting infringements of norms by individuals to a penal sanction. In this regard, criminal law serves a regulatory function by determining not as much the manner of handling values but the category of unacceptable behaviour that may trigger a penal response. Thus, it is not as much legal rights *per se* that are protected but norms of conduct, which as a rule are derived from other areas of law. To some extent, this is reflected in a division into sanctioned norms and sanctioning norms.

The above described protective goal is pursued in three areas, namely, general positive prevention, general negative prevention and individual prevention. In the light of the subject of this paper, the first of the indicated aspects seems particularly significant and is thus given further consideration.

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<sup>73</sup> See e.g.: Jeremy S.K. Chan, *Cultural Issues and Crime*, 12 SAclJ 1–25 (2000).

The notion of general prevention in a positive approach is applied to the impact of criminal law norms on society, leading to the internalisation of a specific value system protected by law<sup>74</sup> by members of the society. Hence, a socially accepted standard of handling legal rights is formed, infringement of which ought to trigger a social condemnation. An individual does not undertake conduct that violates legal rights, since he or she is aware of their value. General prevention in a negative approach has an impact on society at large as well, though here, the decisive factor that affects the attitude of individual persons is fear of punishment<sup>75</sup>. The potential perpetrator restrains himself or herself from conduct that leads to an infringement of legal rights because he or she wants to avoid the pain that might be inflicted on her for this reason. Both aspects of general prevention are focused on future events, affecting the motivational processes in an individual<sup>76</sup>. In this context, the regulatory aspect of criminal law norms is noticeable, since the essence of general prevention is to shape specific social attitudes in a general way. Here, the basic message addressed to the foreign society is: "Should the perpetrator engage in X behaviour, the court of the forum state imposes a punishment on the said perpetrator provided that there is no obstruction of justice." In the event that spatial validity of the norm is not limited, it is formulated even in a situation where the objective of the legislator of the forum state is solely to address the message to its own society. At the same time, in many cases the forum state does not have the standard-setting power.

Apart from protecting rights, the right to punish is also exercised with the intent to satisfy the society's sense of justice, which is referred to by the doctrine of criminal law as exercising the justice (retributive) function<sup>77</sup>. In this regard, penal norms allow for the inflicting of a spe-

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74 Manuel Atienza, Juan R. Manero, *A Theory of Legal Sentences* 122–123 (Springer 1996); Jodłowski, *supra* note 68, at 255; Bayles, *supra* note 67, at 284.

75 Hans Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, in: *What is Justice?* 274 (University of California Press 1971) (1957): "Obedience of the commands of the law is achieved through fear of the sanction". Also: Jodłowski, *supra* note 68, at 255; Bayles, *supra* note 67, at 282; Atienza & Manero, *supra* note 74, at 122; Rudolph, *supra* note 68, at 551.

76 Jodłowski, *supra* note 68, at 254–255; Stanisław Ehrlich, *Dynamika norm* [*The Dynamics of Norms*] 204 (1988); Bayles, *supra* note 67, at 284; Darley, Carlsmith & Robinson, *supra* note 4, at 165.

77 Jodłowski, *supra* note 68, at 260; Bayles, *supra* note 67, at 285.

cific pain on the perpetrator as a recompense for the wrong done. The justice function is rooted in the instinct for revenge, which once satisfied, allows one to regain the sense of balance unsettled by the crime perpetrated. Both the way and the extent to which this function is exercised are culturally conditioned. By exercising *ius puniendi*, the state exercises the administration of justice in the name of its own society. In this perspective, the criminal law response ought to take place in all cases where the perpetrator's behaviour upset the social balance to such an extent that restoration of that balance requires imposing a criminal penalty on the perpetrator<sup>78</sup>.

Criminal law also serves a guarantee function, which imposes on an entity who has the capacity to exercise *ius puniendi* an obligation to shape criminal law norms in a way that allows an individual to identify a specific behaviour at the moment when he or she undertakes to perform it as a potential subject of criminal liability<sup>79</sup>. In the view of criminal law, all conduct not specified as prohibited ought to be considered licit. The guarantee function of criminal law is expressed by the Roman principle *nullum crimen sine lege* that institutes a prohibition against imposing a penalty for an act not described as a crime under the law in force, which as a rule ought to be in writing<sup>80</sup>.

The contemporary concept of criminal law is also focused on neutralising a conflict between the perpetrator and the victim resulting from the committed crime<sup>81</sup>. The above function, referred to as a compensatory function or a conciliatory function, is consistent with the paradigm of restorative justice, which has an increasingly strong effect on the shape of penal provisions<sup>82</sup>. By exercising the right to punish, the state ought to

<sup>78</sup> Bayles, *supra* note 67, at 286.

<sup>79</sup> Fletcher, *supra* note 3, at 12; Jodłowski, *supra* note 68, at 270. Interestingly, in the Anglo-Saxon literature, the guarantee function is precisely connected with the justice function: "Weak retributivism has two basic principles. (1) Only persons who have committed criminal acts may be punished. (2) Punishment is permissible only in proportion to the wrong done." – Bayles, *supra* note 67, at 286.

<sup>80</sup> Mohamed Shahabuddeen, *Does the Principle of Legality Stand in the Way of Progressive Development of Law?*, 2 J. Int'l Crim. Just. 1008 (2004); Franz von Liszt, *The Rationale for the Nullum Crimen Principle*, 5 J. Int'l Crim. Just. 1010 (September 2007); Jodłowski, *supra* note 68, at 270.

<sup>81</sup> Dancig-Rosenberg & Gal, *supra* note 68, at 2318; Jodłowski, *supra* note 68, at 271–272.

<sup>82</sup> According to H. Dancig-Rosenberg, T. Galt: "The restorative justice approach focuses, therefore, on three questions: Who has been harmed; what are their resulting needs;

create conditions so that it is possible to take into account the interests of the victim as an entity equal to the perpetrator in the process of administering justice. Thus, the wronged person ought to have the broadest possible effect on the shape of the criminal liability to be incurred by the one who committed the crime.

### 1.1.2. Sovereignty and human rights as limiting factors of *ius puniendi*

The above understanding of *ius puniendi*, identified with the state's power to implement objectives of criminal law, is limited by a number of conditions. Here, one ought to subject them to detailed systematic analysis and assign them to two factors that have a limiting effect on state powers. Considering the nature of *ius puniendi*, which is a power to draw negative consequences against the perpetrator based on former acts, which at the same time affects the future behaviour of individuals and shapes the norm of conduct the entire society is bound to, one can note here two major levels of conflict. On the one hand, criminal law may affect a foreign state's social organisation in the broad sense, while on the other it may interfere with the individual's freedom if he or she is the perpetrator of a given conduct. In the former case, it may result in an infringement of the sovereignty of another entity, whereas in the latter – in a violation of human rights.

Exercising *ius puniendi* may give rise to a conflict between two sovereign entities in a situation where several states claim to impose punishment or to standardise a conduct subject to criminal law valuation. This is because the forum state strives to exercise the right to punish in respect of the perpetrator who executes a behaviour that falls under the authority of another entity. Oftentimes, it has strong rights to both standardise the perpetrator's conduct and to impose the punishment for the crime. These "clashes of sovereignty" will be discussed below in details.

The direct result of exercising powers that comprise the right to punish is also an imposition of a pain specified by law on an individual as a response to the wrong done by the perpetrator. By undertaking actions

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and who is responsible for meeting those needs" – Dancig-Rosenberg&Gal, *supra* note 68, at 2318; see also: Jodłowski, *supra* note 68, at 272; Fletcher, *supra* note 3, at 36–39.



to satisfy the social sense of justice or to protect legal rights violated by the prohibited act, the state should take into account also the perpetrator's interest. In the view of international law, the minimum standard valid in this regard is determined by a group of norms referred to as the international human rights protection system<sup>83</sup>.

The human right protection system has a binding effect on states. In view of the standardisation of the criminal justice apparatus, its key objective is to determine a standard to be met by the state legislation to ensure proper protection of an individual's fundamental values<sup>84</sup>. The norms it consists of serve a twofold purpose in the process of defining the limits of *ius puniendi*. On the one hand, they authorise the forum state to criminalise specific behaviour performed abroad even at the expense

<sup>83</sup> It should be noted that in the present state of law it is not actually possible to identify one universally acceptable catalogue of "human rights". They should be treated rather as a set of fundamental values, which can then form the basis for the formulation of the rights that all people have. See: Bartosz Liżewski, *Operacjonalizacja ochrony praw człowieka w porządku Europejskiej Konwencji Praw Człowieka. Studium teoretycznoprawne* [Operationalization of Human Rights Protection in the European Convention on Human Rights. Studies From the Perspective of Legal Theory] 67 (2015); Hathaway, *supra* note 10, at 146; Cohen, *supra* note 10, at 178–179; Jack Donnelly, *Universal Human Rights in Theory and Practice* 22–33 (Cornell University Press 2013). Internationally recognized human rights as interpretative directives are also indicated by the ICC Statute; even those acts do not indicate a catalogue of those rights – see: Daniel Sheppard, *The International Criminal Court and "Internationally Recognized Human Rights": Understanding Article 21(3) of the Rome Statute*, 10 Int'l Crim. L. Rev. 46 (2010). Some scholars point to the customary nature of human rights. Such approach, in the face of adopting a conception of value to the individual, does not deserve approval – see: Birgit Schlütter, *Developments in Customary International Law: Theory and the Practice of the International Court of Justice and the International ad hoc Criminal Tribunals for Rwanda and Yugoslavia* 42–46 (Brill-Nijhoff 2010); Cohen, *supra* note 10, at 166; Andrzej Sakowicz, *Zasada ne bis in idem w prawie karnym w ujęciu paneuropejskim* [The Principle of Ne Bis In Idem in Criminal Law in a Pan-European Perspective] 164 (2011); Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* 210 (Oxford University Press 1989). This approach was reflected in Barcelona Traction (Belg. v. Spain), 1970 I.C.J. 3 (Separate Opinion in the Judgment of Feb. 5): "Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23); others are conferred by international instruments of a universal or quasi-universal character."

<sup>84</sup> Tomasz Iwanek, *Zbrodnie ludobójstwa i zbrodnie przeciwko ludzkości w prawie międzynarodowym* [Crimes of Genocide and Crimes against Humanity in International Law] 91 (2015); Jackson, *supra* note 10, at 126; Hathaway, *supra* note 10, at 147.

of limiting other states' sovereignty<sup>85</sup>. The fact of compromised human rights may serve as a reason for extending *ius puniendi* onto specific categories of acts to ensure proper protection of human rights, which may become infringed as a result of a crime. In this regard, human rights constitute a positive responsibility<sup>86</sup>. On the other hand, human rights limit the scope of this power in a way that prevents the right to punish from being excessively extended and, consequently, in a way that prevents the individual's rights from being violated, since the right to punish can be exercised only to the extent that it does not violate human rights itself.

In both cases, the reference point is the individual perpetrator's act, assessed from the view of possible imposition of a criminal penalty on the said perpetrator. The key issue here does not pertain to the matter of executing the human rights standard as a whole but is focused on protecting fundamental values described in the first-generation human rights<sup>87</sup>. These rights will be infringed by excessive criminalisation or a lack of criminalisation of certain conducts. They protect values derived directly from human dignity<sup>88</sup>, which thus gain the status of international legal rights. The said rights are common, innate, inalienable, inviolable, natural and indivisible<sup>89</sup>. Neither their existence nor the obligation to

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85 This is especially evident in the context of offenses committed by public officials of foreign countries (e.g. the Pinochet case) see: Clunan, *supra* note 10, at 10; Sakowicz, *supra* note 83, at 164.

86 Iwanek, *supra* note 84, at 91; Jakub Czepek, *Zobowiązania pozytywne państw w sferze praw człowieka pierwszej generacji na tle Europejskiej Konwencji Praw Człowieka* [State's Positive Commitments in the Field of Human Rights of the First Generation Against the Background of the European Convention on Human Rights] 16–18 (2014); Evelyne Schmid, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law* 50 (Cambridge University Press 2015).

87 Raha L. Zohadi, *The Generations of Human Rights*, 1 Int'l Stud. J. 99–101 (2004).

88 See: UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), the 1 Art.; UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, the 10 Art.; UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249 (The Preamble); UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, (The Preamble); European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, the 1 Article.

89 Donnelly, *supra* note 83, at 23; Robert Andrzejczuk, *Prawa człowieka w świetle uwarunkowań kulturowych i prawnych* [Human Rights in the Light of Cultural and Legal Conditions] 139–152 (2011). It is important to point out, however, that this is not a universal approach – there are also concepts that explicitly point to the limited nature

respect them is dependent on the will of states since they exist objectively regardless of the contents of norms. Acts of international law only confirm the need to protect them and still give rise to no powers of an individual<sup>90</sup>. Being of minor significance, the second- and third-generation rights remain uncovered in these considerations. Importantly, in some situations, particularly where the state's actions are aimed at blocking the powers defined by the second- and the third-generation rights, they can be subject to the forum state's criminal law protection as well<sup>91</sup>.

To sum up the above, there are two aspects of state power, which are executed during the process of establishing and enforcing penal law – legislative jurisdiction and *ius puniendi*. Both of them influence the scope of spatial validity of penal norms. This issue will be discussed in details in the third part of the work.

## 2. Normative analysis as a method of describing the conditions for criminal liability

At present, normative analysis constitutes a basic research instrument<sup>92</sup> used in Polish criminal law science alongside the dogmatic method, allowing conditions for criminal liability to be described within the overall

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of human rights in the sense that their borders determine the possibility of effective enforcement – cf. Cohen, *supra* note 10, at 187–195.

90 Andrzejczuk, *supra* note 88, at 143.

91 Schmid, *supra* note 86.

92 Piotr Kardas, *O relacjach pomiędzy strukturą przestępstwa a dekodowanymi z przepisów prawa karnego strukturami normatywnymi* [On the Relations Between the Structure of Crime and Penal Normative Structures], XVI Czasopismo Prawa Karnego i Nauk Penalnych 5–6 (2012). The above thesis is evidenced by the growing number of publications on criminal law, which are based directly on normative structures, in this way explaining the essence of individual dogmatic institutions. See: Piotr Kardas, *Zbieg przepisów ustawy w prawie karnym. Analiza teoretyczna* [The Concurrence of the Provisions of the Act in Criminal Law. Theoretical Analysis] 259–293 (2011); Małgorzata Dąbrowska-Kardas, *Analiza dyrektywalna przepisów części ogólnej kodeksu karnego* [The Directive's Analysis of the Provisions of the General Part of the Penal Code] (2012); Włodzimierz Wróbel, *Zmiana normatywna i zasady intertemporalne w prawie karnym* [Normative Change and Intertemporal Principles in Criminal Law] (2003); Łukasz Pohl, *Struktura normy sankcjonowanej w prawie karnym. Zagadnienia ogólne* [The Structure of the Sanctioned Norm in Criminal Law. General Issues] (2007); Ryszard Dębski, *Jeszcze o normie prawnokarnej* [Once Again about the Penal Norm] in *Nauki penalne wobec szybkich przemian socjokulturowych. Księga jubileuszowa Profesora Mariana Filara* [Penal Sciences in the Face of Rapid Sociocultural Changes. Anniversary Book of Professor Marian Filar] 109–128 (Andrzej Adamski ed. 2012). Michał Królikowski

structure. Its basic assumption lies in a strict differentiation between a legal provision and a norm<sup>93</sup>. Provisions are regarded here only as standard-setting expressions that can potentially contribute to creating a norm. They do not constitute an independent directive of conduct. It is only the legal norms interpreted based on these provisions that are regarded as complete legal directives that determine how an individual should behave<sup>94</sup>.

Norms are formed based on provisions and other directival expressions (e.g., scientific indications, social rules). These pursue a twofold purpose: 1) to determine how one ought to behave in a specific social situation, and 2) to constitute a legal assessment pattern of the actor's behaviour<sup>95</sup>. For instance, when driving a car, the driver is obliged to behave in a specific manner, i.e., to drive in the right lane at a specified speed with hands on the wheel, etc. The above orders are provided for in various provisions of law, yet they make up a single norm that indicates how one ought to behave in a given road traffic situation. If an individual infringes a binding norm, his or her behaviour ought to be considered unlawful<sup>96</sup>.

Each norm has its scope of validity, scope of applicability and an addressee. The notion of validity determines the characteristic of a given

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defined this trend as "normative dogmatics" – see: Michał Królikowski, *Kontekstowa teoria (dogmatyki) prawa karnego* [Context Theory of the Criminal Law (dogmatic)], XLVI *Studia Iuridica* 185–196 (2006).

93 S. Ehrlich, *supra* note 76, at 109–111; Andrzej Grabowski, *Prawnicze pojęcie obowiązywania prawa stanowionego. Krytyka niepozytywistycznej koncepcji prawa* [Juristic Concept of the Validity of Statutory Law: A Critique of Contemporary Legal Nonpositivism] 252 (2009).

94 Christie, *supra* note 6, at 2–3, 14; S. Ehrlich, *supra* note 76, at 91.

95 This approach combines two aspects of the standard, distinguished by M. Puig: "Those who conceive of a criminal norm as a 'norm of valuation' regard it as an expression of a *value judgment* distinguishing what is licit according to criminal law from what is illicit. In that sense, article 407 of the Criminal Code is nothing but a judgment about the dis-value of killing another person. [...] The *imperative* theory, in contrast, regards a criminal norm as a norm of *determination*, that is, as a *command or prohibition* addressed to the citizens. In that sense, the legal order consists of expressions of the legislator's will requiring certain behaviour from the members of the legal community, and its norms are obligatory prohibitions the people concerned must comply with." – Santiago M. Puig, *Introducción a las bases del Derecho penal* (1976), cit. for. Atienza&Manero, *supra* note 74, at 121, 129.

96 The above approach seems to correspond with the solution of E. Bulygin, according to which the norm is combining the social situation with its legal solution, see: Carlos Alchourrón & Eugenio Bulygin, *Normative Systems* 42 (Springer 1971).

norm that allows one to determine the likelihood of a situation where a given norm will serve as a directive of conduct<sup>97</sup>. Thus, a behaviour that is in conflict with the norm constitutes an infringement of the law. The scope of applicability specifies the group of actual situations where the norm serves as a pattern of conduct or an assessment pattern. If act X is regulated by norm Y, the said norm finds application in the case of this particular act<sup>98</sup>. In this perspective, validity can be described as an “existence” of a norm<sup>99</sup>, while applicability of this norm is described as “putting it to use”. The addressee of the norm is an individual obliged to behave in line with its instructions. Depending on the nature of the norm, it is either each person living in this world (e.g., regarding the common abolition of slavery) or a specific group of people characterised by a distinctive quality (e.g., members of the *Sejm* of the Republic of Poland regarding the voting procedure).

In the model presented, the inner structure of a norm consists of two elements, namely, a hypothesis and a disposition<sup>100</sup>. A hypothesis determines the conditions of the external world that are vital for the actualisation of an obligation described in a disposition. Regarding the example described above, it ought to be said that, in simple terms, if an individual a) is moving in a car, b) on a public road (hypothesis), he or she should be a) driving the right lane, b) with the lights on, and c) with his or her hands on the wheel (disposition). Importantly, no autonomic element of the norm in the form of sanctions was distinguished as part of this elaboration. In the presented approach, the responsibility to impose a penalty constitutes a disposition of a sanctioning norm addressed to the authority. This issue will be subjected to analysis further in the paper. A thus described norm constitutes a complex legal construct interpreted

97 Kelsen, *supra* note 75, at 267.

98 It should be noted that in the legal sciences there is a distinction between the material and procedural possibility of using a standard. It is pointed out by G. Hallevy: “The distinction between applicability and jurisdiction is not within the exclusive domain of criminal law, but it is relevant to all spheres of the law. Applicability of the norm and jurisdiction are different terms relating to different legal aspects. Applicability of a norm means the subordination of a certain event to a relevant legal norm. If the norm is applicable, the event must be judged according to the norm.” – Hallevy, *supra* note 18, at 82.

99 Kelsen, *supra* note 75, at 267; Christie, *supra* note 6, at 11; Eugenio Bulygin, *Existence of norm*, in: *Actions, Norms, Values: Discussions with Georg Henrik von Wright* 242 (Georg Meggle ed., New York 1999).

100 S. Ehrlich, *supra* note 76, at 106–109.

based on a number of directival expressions<sup>101</sup>. These expressions have no scope of validity or applicability of their own, but remain constituents of the norm solely. They are characterised by an attribute called “the standard-setting competence”, which identifies the capacity to co-create a norm.

Transposing the above considerations to the area of substantive criminal law, one should note that Polish criminal law doctrine<sup>102</sup> distinguishes, in particular, three<sup>103</sup> normative structures that are either reduced or further developed depending on the presented concept. These include a sanctioned norm, a sanctioning norm and a norm of competence<sup>104</sup>, jointly referred to as penal norms in a broad sense<sup>105</sup>. Each of them satisfies formal conditions to be given independent status<sup>106</sup>, since they are all characterised both by an individual scope of standard-setting and the scope of applicability<sup>107</sup>, as well as determines its addressees.

101 Reinhold Zippelius, *Introduction to German Legal Methods* 63–64 (Kirk W. Junker & Matthew Roy trans., Carolina Academic Press 2008); Grabowski, *supra* note 93, at 253.

102 Reflection on normative structures in Polish penal law was initiated by two works of Andrzej Zoll, published in 1990: Andrzej Zoll, *O normie prawnej z punktu widzenia prawa karnego* [On the Legal Norm From the Point of View of Criminal Law], XXIII Krakowskie Studia Prawnicze 69–95 (1990); Andrzej Zoll, *Karalność i karygodność czynu jako odrębne elementy struktury przestępstwa* [Penalty and Criminality of an Act as Separate Elements of the Crime Structure] in *Teoretyczne problemy odpowiedzialności karnej w polskim oraz niemieckim prawie karnym* [Theoretical Problems of Criminal Liability in Polish and German Criminal Law] 101–112 (Tomasz Kaczmarek ed., 1990). See also: Dąbrowska-Kardas, *supra* note 92, at 164; Pohl, *supra* note 92, at 19–48; Piotr Kardas, *Teoretyczne podstawy odpowiedzialności karnej za przestępne współdziałanie* [Theoretical Basis of Criminal Liability For Criminal Cooperation] 65–87 (2001).

103 It shall be noted that above conception is not the only one, but it is the most widespread in Polish doctrine of criminal law. It explains the relations between a perpetrator and a court in a complex way.

104 See: Wróbel, *supra* note 92, at 28–29; Dąbrowska-Kardas, *supra* note 92, at 171–184; Kardas, Zbieg, *supra* note 92, at 269–270.

105 Włodzimierz Wróbel, *Struktura normatywna przepisu prawa karnego* [Normative Structure of the Criminal Law Provision], LV Ruch Prawniczy, Ekonomiczny i Socjologiczny 94 (1993).

106 Dąbrowska-Kardas, *supra* note 92, at 173; Kardas, Zbieg, *supra* note 92, at 269–270.

107 Polish doctrine of criminal law generally accepted the view that: “it is useful to introduce the term ‘scope of a usage of a norm’ to denote the class of all these situations, after which the addressee of the norm (the person to whom the order is addressed) should fulfil the norms of behaviour...]. The scope of actions regulated by the norm (the scope of normalization of a norm) is, respectively, the class of these potential future acts of addressees to which the norm will be applied. [transl. DZ]” – Zygmunt Ziemiński, *Podstawowe problemy prawoznawstwa* [Basic Problems of Jurisprudence] 129–131 (1980).

Essentially, a sanctioned norm can be said to describe the desired way of a man's conduct by referring to situations that can potentially occur in the real world. Thus, here, the addressee is an individual<sup>108</sup>. The conjugated sanctioning norm is addressed to the court<sup>109</sup>. It imposes on the latter the obligation to hold a person who infringed a sanctioned norm criminally liable. In this view, the role of the sanctioning norm is to protect the sanctioned norm against infringement (to sanction these infringements). The norm of competence is addressed both to the court, thus authorising it to impose a penalty, and to the individual, who is hence ordered to submit to the judgement of the court<sup>110</sup>. The above approach is, in essence, an adaptation of Hans Kelsen's idea, which differs in that it assumes the scheme was divided into three categories of norms. According to the approach of the founder of normativity, "The legal norm refers to the conduct of two entities: the citizen, against whose delict the coercive measure of the sanction is directed, and the organ that is to apply the coercive measure to delict"<sup>111</sup>. Therefore, Kelsen assumed that the responsibility to impose a penalty should be covered by the very same norm that pertains to the individual's responsibility to undertake a specific behaviour in a given social situation<sup>112</sup>.

The thus distinguished normative structures correspond to the dogmatic definition of a crime that functions in Polish criminal law doctrine, according to which the subject of criminal liability is: 1) an act that is 2) illegal, 3) punishable, 4) socially harmful, and 5) culpable. The above definition is referred to as "the structure of the crime" and in fact encompasses a brief description of key conditions for establishing criminal liability. In this approach, the sanctioned norm is combined with the level of the act and illegality – an infringement of the norm allows the criminal illegality to be determined. The sanctioning norm corresponds to

108 Wróbel, *supra* note 92, at 66; Kardas, Zbieg, *supra* note 92, at 278; Dąbrowska-Kardas, *supra* note 92, at 177.

109 Dąbrowska-Kardas, *supra* note 92, at 178; Kardas, Zbieg, *supra* note 92, at 174; Wróbel, *supra* note 92, at 67; Wróbel, *supra* note 105, at 96.

110 Dąbrowska-Kardas, *supra* note 92, at 182; Kardas, Zbieg, *supra* note 92, at 278.

111 H. Kelsen: "obedience of the commands of the law is achieved through fear of the sanction" – Kelsen, *supra* note 75, at 274–275.

112 In a similar way the penal norm is described by G. Hallevy: "The criminal norm contains two parts: a valid conditional clause and a criminal sanction. Both parts are required to identify the criminal norm" – Hallevy, *supra* note 18, at 16.



the level of punishability, culpability and fault. The norm of competence constitutes a link which ensures that both structures are connected in a functional manner<sup>113</sup>.

All the three norms are functionally conjugated. It seems particularly important to emphasise the conjugation between the sanctioned norm and the sanctioning norm, which manifests itself in the actualisation of a disposition of the sanctioning norm in the event of an aggravated infringement of the sanctioned norm. Thus, if an individual who is the addressee of sanctioned norm N infringes the norm by means of his behaviour, the court who is the addressee of sanctioning norm N<sub>s</sub> imposes a penalty on the individual for the infringement of norm N based on norm N<sub>s</sub>.

Further considerations provide a description of the sanctioned norm and the sanctioning norm. The issue of the norm of competence was not covered in the article, as a broader analysis of this matter is not vital for presenting the main assumptions that underlie the model of interpreting norms in an international context.

## 2.1. Sanctioned norm

A sanctioned norm (N) constitutes a legal rule of conduct that specifies the way in which the addressee of the norm ought to behave (disposition) in a situation where an actual state provided for in the said norm takes place (hypothesis)<sup>114</sup>. It is called a primary norm<sup>115</sup>, as it refers directly to potential events in the real world and regulates the behaviour of individuals (in contrast to sanctioning norms and competence norms called

113 Kardas, O relacjach, *supra* note 92, at 17; Dąbrowska-Kardas, *supra* note 92, at 199; Kardas, O relacjach, *supra* note 92, at 45.

114 Sometimes it is called the norm of the order/prohibition ("norma nakazu/zakazu"). In essence, it describes the acceptable degree of exposure of a legal good (for example, acceptable endangerment while driving a car is determined by speed limits, etc.). See: Wróbel, *supra* note 92, at 66; Kardas, Zbieg, *supra* note 92, at 270; Jacek Giezek, *Narażenie na niebezpieczeństwo oraz jego znaczenie w konstrukcji czynu zabronionego* [Exposure to Danger and Its Importance in the Construction of a Prohibited Act], 50 *Przegląd Prawa i Administracji* 113–114 (Zdzisław Kegel ed., 2002).

115 Kardas, Zbieg, *supra* note 92, at 270; Dąbrowska-Kardas, *supra* note 92, at 134; Kardas, O relacjach, *supra* note 92, at 37. Sanctioned norm realizes therefore the so-called *ex-ante* function of criminal law, affecting the behaviour of the matter before committing the act, see: Darley, Carlsmith & Robinson, *supra* note 4, at 166.



secondary norms<sup>116</sup>, which provide a description of certain conventional conduct of the body<sup>117</sup>). It involves a specified order or a prohibition against a specific behaviour which, if infringed, might (but does not have to) result in a need to impose a penalty on the perpetrator<sup>118</sup>.

The key objective of the existence of a sanctioned norm is to provide the most precise definition of rules of conduct to be observed in contact with values protected by law, which are referred to as legal rights<sup>119</sup>. The addressee of a sanctioned norm is only an individual whose conduct falls within the legislative jurisdiction under which it was issued. The obligation to observe the norm is independent of decisions of any bodies. The conflict between the conduct and the content of a norm determines whether it serves as a condition for determining its illegal nature. A sanctioned norm also describes the legally relevant piece of social reality, thus influencing the first element of the structure of a crime, i.e., the act<sup>120</sup>. Owing to a sanctioned norm, it can be said that behaviour X constitutes an act under the criminal law, whereas behaviour Y cannot be considered an act<sup>121</sup>. It allows one to distinguish legally significant conduct of the perpetrator from a continuum of his or her life.

The further considerations in this paper were derived from a concept<sup>122</sup> according to which a sanctioned norm consists of two categories of elements. The first one is a prohibition/order (Z), which serves as its core and is derived from a provision that penalises a given behaviour<sup>123</sup>. The

116 Kardas, Zbieg, *supra* note 92, at 279; Dąbrowska-Kardas, *supra* note 92, at 134.

117 Kardas, Zbieg, *supra* note 92, at 275; Dąbrowska-Kardas, *supra* note 92, at 136. "It creates 'institutional fact'" – Kratochwil, *supra* note 3, at 25–28.

118 Wróbel, *supra* note 92, at 28; Dąbrowska-Kardas, *supra* note 92, at 198; Kardas, Zbieg, *supra* note 92, at 274–275; Kardas, O relacjach, *supra* note 92, at 32.

119 Kardas, Zbieg, *supra* note 92, at 271; Dąbrowska-Kardas, *supra* note 92, at 134.

120 Kardas, Zbieg, *supra* note 92, at 270; Dąbrowska-Kardas, *supra* note 92, at 135; Kardas, O relacjach, *supra* note 92, at 50.

121 Sometimes in the field of criminal law they are referred to as the "prerequisites" that must be fulfilled in order to be able to rely on normalization at all. However, there is no doubt that they are normative (they are a pattern) and should therefore be directly related to the content of the standard. Their detailed analysis was presented by Ł. Pohl – Pohl, *supra* note 92, at 68–88. See also: Kardas, Zbieg, *supra* note 92, at 271; Dąbrowska-Kardas, *supra* note 92, at 175.

122 Kardas, Zbieg, *supra* note 92, at 261–262; Pohl, *supra* note 92, at 19–55.

123 Kardas, Zbieg, *supra* note 92, at 274; Pohl, *supra* note 92, at 60. To some extent, a similar point of view was represented by F. Kratochwil, who wrote: "Many directives in rule-form, such as the indicative statement printed on the notes of German legal tender that 'anyone who counterfeits notes will be imprisoned for not less than two years' have to be taken as directives in spite of the descriptive phrasing" – Kratochwil, *supra* note 3, at 73.

second one consists of directives that ensure adequacy of its content (P). These are derived from other areas of law (either national:  $P_n$  or foreign:  $P_f$ )<sup>124</sup> or take the form of non-legislative rules derived from life experience or scientific knowledge<sup>125</sup>. This model of norm can be described by the following formula:  $N = Z - (P_f + P_n)$ . By specifying individual categories of normative expression (elements of norm) that influence the contents of a sanctioned norm, it will be possible to specify the scope of their competence to set standards and, consequently, to determine the content of the binding norm.

Both these elements (Z and P) serve as directive standard-setting expressions and not independent norms of conduct – further jointly referred to as directives of conduct<sup>126</sup>. A thus described sanctioned norm consists of a general prohibition/order and directives of conduct that further specify its contents<sup>127</sup>. Compared to the directives of conduct, a general prohibition/order seems to be weaker and gives way to these directives. This can be described as follows: the content of a prohibition defined in the criminal law prohibits undertaking any behaviour that leads to a specific result S. At the same time, there are directives of conduct that allow behaviours X, Y and Z that can potentially lead to the same result. Therefore, a sanctioned norm takes on the following form:

<sup>124</sup> Dąbrowska-Kardas, *supra* note 92, at 195–196.

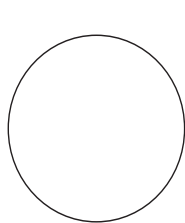
<sup>125</sup> Zoll, O normie, *supra* note 102, at 80; Jacek Giezek, *Przyczynowość oraz przypisanie skutku w prawie karnym* [Causation and Attributing Effect to Criminal Law], CCXXIX Acta Universitatis Wratislaviensis 91 (1994); Kazimierz Buchała, *Przestrzeganie zasad ostrożności – problem bezprawności czy winy* [Observance of the Rules of Prudence – the Problem of Unlawfulness or Guilt], 209 Państwo i Prawo 89 (1963); Kazimierz Buchała, *Bezprawność przestępstw nieumyślnych oraz wyłączające je dozwolone ryzyko* [Unlawfulness of Unintentional Crimes and Allowed Risks Excluding Offenses] 122 (1971); Włodzimierz Wróbel, *Zagadnienie naruszenia reguł wymaganej ostrożności* [The Issue of Violation of the Rules of Required Caution], in *Orzecznictwo sądowe w sprawach karnych. Aspekty europejskie i unijne* [Judicial jurisprudence in criminal matters. European and EU aspects] 169–181 (Lech Gardocki et al. eds., 2008); Dąbrowska-Kardas, *supra* note 92, at 204–214; Jacek Giezek, *Przewidywanie czynu zabronionego oraz zamiar jego uniknięcia jako podmiotowe elementy świadomej nieumyślności* [Predicting a Prohibited Act and the Intention to Avoid It as Subjective Elements of Mens Rea] in *Nauki penalne wobec szybkich przemian socjokulturowych. Księga jubileuszowa Profesora Mariana Filara* [Penal Sciences in the Face of Rapid Sociocultural Changes. Anniversary Book of Professor Marian Filar] 137 (Andrzej Adamski ed., 2012); Kratochwil, *supra* note 3, at 73.

<sup>126</sup> Dąbrowska-Kardas, *supra* note 92, at 193–196; Kardas, Zbieg, *supra* note 92, at 271; Kardas, O relacjach, *supra* note 92, at 38.

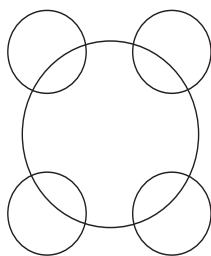
<sup>127</sup> Kardas, Zbieg, *supra* note 92, at 271; Dąbrowska-Kardas, *supra* note 92, at 195; Pohl, *supra* note 92, at 102.

any behaviour leading to the result S except for behaviour X, Y and Z is prohibited. Should the perpetrator of a given behaviour be found to act in line with the directive of conduct, it cannot be said that a prohibition was violated. Consequently, the sanctioned norm was not infringed and no illegal behaviour was committed<sup>128</sup>. In this view, directives of conduct serve as expressions that limit the content of the prohibition expressed in the criminal law<sup>129</sup>.

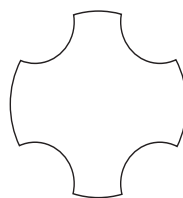
In this regard, one can see more clearly the difference between a prohibition/order, indefinite and formulated only in general terms, and a sanctioned norm in its adequate form, binding in the reality of a given case and further defined. Thus, the state introduces a general prohibition against/an order to do X, whereas any derogation is determined by directives of conduct. By taking both elements into account, one can interpret the sanctioned norm binding in a given case that can serve as a pattern of assessment of the perpetrator's act from the perspective of illegality.



a. prohibition/order



b. prohibition/order and directions of conduct



c. sanctioned norm

Particular elements that contribute to the sanctioned norm are not autonomous norms of conduct. They have no value of validity, only the competence to set standards (a capacity to contribute to a norm). At the

<sup>128</sup> Kardas, Zbieg, *supra* note 92, at 271; Dąbrowska-Kardas, *supra* note 92, at 196; Kardas, O relacjach, *supra* note 92, at 39; Giezek, *supra* note 114, at 115; Marek Bielski, *Obiektywna przypisywalność skutku w prawie karnym* [Objective Attributability of Effect in Criminal Law] 185 (unpublished doctoral dissertation, available at Jagiellonian University Library, 2010); Ryszard Dębski, *Pozaustawowe znamiona przestępstwa. O ustawowym charakterze norm prawa karnego i znamionach typu czynu zabronionego nie określonych w ustawie* [Non-Statutory Constituent Elements of Crime. On the Statutory Character of Criminal Law Norms and Elements of a Prohibited Act Not Specified in the Act] 184 (1995).

<sup>129</sup> Dąbrowska-Kardas, *supra* note 92, at 195.

same time, they constitute normative expressions issued by individual states that have the standard-setting power in this regard. In this view, it seems necessary to determine the limits of the said competence to form both by means of the very prohibition/order that is its key element and by individual directives of conduct that further specify the content of the prohibition. Here, one ought to take into account the varying character of both standard-setting expressions. While the directive of conduct that is solely regulatory corresponds to a normative expression of non-penal nature, an order/prohibition of conduct derived from a penal norm reflects the regulatory aspect of *ius puniendi*.

## 2.2. Sanctioning norm

The content of the sanctioning norm can be described as an order to impose the penalty on the perpetrator filed in the court whereby the perpetrator is concluded to have breached the sanctioned norm he or she is bound to as well as some other conditions of criminality (the age of the perpetrator, the place of the act, criminal responsibility, etc.). An infringement of a sanctioned norm constitutes, therefore, the first condition for a penalty to be imposed on the perpetrator by the court – a condition for actualising the disposition of a sanctioning norm<sup>130</sup>. A formula reflecting the composition of a sanctioning norm ( $N_s$ ) could take the following form:  $N_s = \sim[Z - (P_f + P_n)] + P_{s1} + P_{s2} + \dots + P_{sn}$ , where symbols  $P_{s1}$ ,  $P_{s2}$ ,  $P_{sn}$  stand for other circumstances determining the imposition of a penalty<sup>131</sup>. In this view, a sanctioning norm is secondary to a sanctioned norm<sup>132</sup> as, in essence, it is only a legal instrument that protects a sanc-

130 The breach must be qualified and thus also meet requirements other than the violation of the sanctioned standard. They were described in the content of the sanctioning norm, which refers to social harmfulness or intent. See: Kardas, Zbieg, *supra* note 92, at 274; Dąbrowska-Kardas, *supra* note 92, at 137–138; Kardas, O relacjach, *supra* note 92, at 43; Zoll, O normie, *supra* note 102, at 72.

131 The example of such circumstances may also be the perpetrator's age – see: Gerhard Mueller, Michael Gage, Lenore R. Kupperstein, *The Legal Norms of Delinquency. A comparative study* 10–13 (1969).

132 M. Atienza, citing P. Mir, indicates: “within the sphere of criminal norms, he distinguishes between the already mentioned ‘primary’ norms, ‘secondary’ norms (addressed to the judge, ordering him to inflict some punishment)” – Atienza & Manero, *supra* note 74, at 124; Kardas, Zbieg, *supra* note 92, at 274; Dąbrowska-Kardas, *supra* note 92, at 135; Kardas, O relacjach, *supra* note 92, at 43.

tioned norm against infringement<sup>133</sup>. The content of the sanctioning norm becomes embedded into the content of a sanctioned norm, while the sanctioning norm strengthens the message of the standard of conduct.

A disposition of the sanctioning norm (an order to impose a penalty) is derived from a provision of criminal law<sup>134</sup>. The norm itself is referred to as a criminal norm in the strict sense. Decoding the sanctioning norm requires only provisions provided for in legal acts issued by the forum state. In principle, these are not made adequate here by referring to foreign norms – being pure criminal norms not characterised by the regulatory aspect, they constitute an expression of a properly discretionary authority of the state. Nevertheless, even in the case of these norms, their contents may be modified in certain ways with regard to the introduction of a negative condition for establishing liability in the form of the requirement of dual criminality<sup>135</sup>. Should such a requirement be in force in a given situation, the actualisation of the disposition of a sanctioned norm depends on whether the foreign state views the perpetrator's behaviour as a crime.

133 Zoll, O normie, *supra* note 102, at 72–73; Kardas, Zbieg, *supra* note 92, at 274; Dąbrowska-Kardas, *supra* note 92, at 135; Kardas, O relacjach, *supra* note 92, at 43; Giezek, *supra* note 114, at 113.

134 Kardas, Zbieg, *supra* note 92, at 184, p. 275.

135 Otto Lagodny, *Possible Ways to Reduce the Double Criminality Requirement: From double criminality to double prohibition*, European Committee On Crime Problems (CDPC), PC-TJ, 2 (2005), [http://www.coe.int/t/dghl/standardsetting/pc-oc/PC-TJ%20\\_2005\\_%2006%20E%20%20Lagodny%20Poss%20ways%20to%20reduce%20the%20double%20Crim.pdf](http://www.coe.int/t/dghl/standardsetting/pc-oc/PC-TJ%20_2005_%2006%20E%20%20Lagodny%20Poss%20ways%20to%20reduce%20the%20double%20Crim.pdf); Jonathan O. Hafen, *International Extradition: Issues Arising under the Dual Criminality Requirement*, 1992 BYU L. Rev. 194 (1992); *Note on dual criminality, in concreto or in abstracto*, European Committee On Crime Problems (CDPC), PC-OC, 02 Final 2 (2012), [http://www.coe.int/t/dghl/standardsetting/pc-oc/PCOC\\_documents/PC-OC%20\(2012\)%202%20Final%20Note%20on%20dual%20criminality%20in%20concreto%20or%20in%20abstracto.pdf](http://www.coe.int/t/dghl/standardsetting/pc-oc/PCOC_documents/PC-OC%20(2012)%202%20Final%20Note%20on%20dual%20criminality%20in%20concreto%20or%20in%20abstracto.pdf).

## Claims

### 1. Between regulation and penalization

Despite the fact that it is theoretically possible to make a strict division between the right to punish for human conduct and the right to regulate human conduct, in practice it proves impossible<sup>136</sup>. It is somewhat hypocritical to claim that state X does not prohibit specific behaviour yet imposes a penalty upon each person who engages in such behaviour provided that he or she is under its jurisdiction<sup>137</sup>. One could claim *prima facie* that the right to punish ought to be regarded solely as an imposition of a penalty for a specific act regardless of the regulatory aspect. The said penalty is imposed based on the principle of territoriality within the borders of the forum state. In this regard, it should be mentioned that the message addressed to the foreign society has no prohibitive nature but reads as follows: “Should the perpetrator engaging in behaviour X find him- or herself within the borders of the forum state, he or she bears the penalty.” The above interpretation does not deserve to be accepted, though. Firstly, in this view criminal law does not exercise the protective function understood as protecting values, but serves as a mi-

<sup>136</sup> M. Bayles, characterizing the criminal law, indicated: “The distinctive features of criminal law are strict prohibitions of actions and imposition of harms (possibility of imprisonment) on offenders” – Bayles, *supra* note 67, at 281.

<sup>137</sup> Atienza & Manero, *supra* note 74, at 122.

gration policy tool. This must give rise to objection given the wording of the principle of proportionality. Secondly, taking into account that criminal law in a strict sense, being disconnected from the regulatory aspect, sanctions infringements of norms of conduct, it ought to be indicated that in the analysed situation it is still vital to determine the norms that the perpetrator was bound to at the time of a given act. Their validity cannot be reliant on uncertain future circumstances, whereas the solution depicted above assumes that a prohibition is not in force until the moment of crossing the border. This is due to the fact that if one considers a prohibition to be mandatory, while the condition of one's presence within the territory pertains solely to a sanctioning norm, then the alleged impact of norms of an order/prohibition on internal relations of a foreign state remains valid.

When taken into account, the regulatory aspect of criminal law gives rise to significant problems in the process of decoding penal norms. In fact, the forum state with its strong right to punish may prove to have no legislative jurisdiction. Therefore, one ought to ask whether a state has the competence to set a common norm that imposes punishment for, e.g., each and every murder illegal under the law that the perpetrator is bound to regardless of the source of the said law. This can be depicted as follows:

Each perpetrator of an illegal murder shall be punished by the court of state X.

- a. Perpetrator A committed a murder.
- b. Perpetrator A is liable to a punishment imposed by the court of state X.

In this view, the only uncertain element is the applied method of determining illegality (sanctioned norm). Theoretically, there is no reason penalisation (sanctioning norm) would not cover, for instance, an illegal disclosure of a foreign state's secret, even though the very issue of regulating the way in which such a secret is handled lies within the exclusive competence of the foreign state. In this regard, the state might protect virtually any norm of conduct indirectly provided that the introduction of protective instruments does not infringe international law.

The above described mixed character of criminal law (regulatory and penal) is reflected in the structure of conjugated norms. In the background part it was mentioned that penal norms are built from normative elements (e.g. provisions of law) derived from different sources (bills,

codes, etc.). Some of them have a more regulatory character, others more penal. We can divide them into three groups:

- a. directives (element of a sanctioned norm) – e.g. you shall drive to the right;
- b. prohibition/order (element of a sanctioned norm) – e.g. you shall not cause the death;
- c. elements of sanctioning norm – you shall impose the punishment on an individual who causes death illegally.

The first of the above category has the most regulatory character. It can work without penalization. The last one is the penal *per se*. The prohibition/order lay somewhere between regulation and penalization. Further considerations are focused on presenting a model of limiting the validity of each of these elements, taking into account factors of limitation of state power, all described in the background section.

## 2. Legislative jurisdiction in the context of criminal law

As it was said above, the directives (elements of a sanctioned norm) have a purely regulatory character. They are derived from different branches of law and indicate how to behave in a particular social situation (how to drive a car, which kind of taxes we should pay, under what circumstances you can do anything, etc.). The question is how to indicate binding directives when such a situation has an international or cross-border character. In this aim it is necessary to establish the spatial scope of validity of the directives, taking into account the national laws, the limits of legislative jurisdiction and the rule of reason, which allows elimination of concurrent competencies, the setting of which seems necessary in the process of decoding a norm.

The state has the power to limit the validity of its law in space – this solution is widely enforced in domestic legal systems<sup>138</sup>. It is possible to indicate four main methods of limitation. Firstly, national law can introduce a special regulation that limits the validity of norms interpreted with account to provisions of a given normative act (e.g., an act that regulates

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<sup>138</sup> This solution is present especially in common law systems, where presumption against extraterritoriality is in force – see: Doyle, *supra* note 2, at 5; Knox, *A Presumption*, *supra* note 11.



the drug trade is binding solely within the territory of a given state). Secondly, this limitation may arise from the provision itself, as it constitutes the grounds for decoding a sanctioned norm in terms of a directive of conduct (e.g., in the case of provisions that refer to crossing of state X's borders). Thirdly, the limits of the "competence to set standards" may also shape limited competencies of a body whose decision determines the validity of a norm (e.g., marketing authorisation of pharmaceuticals). Fourthly, there might occur a precise conflict of law rule that excludes the validity of a directive in the case that it becomes concurrent with another directive of conduct.

The highest number of interpretative issues occurs in the cases where neither precise conflict of law rules nor domestic limitations appear. In such cases, the only tool for limiting the scope of the competence to set standards is an indefinite rule of reason.

Let's imagine a situation, when one man, the citizen of state Y, starts to produce some medicines in his or her factory which is placed in state X. These medicines are dedicated only for the internal market of state Y. State Y provides the law that everyone who is producing any drugs for the internal market of Y is obliged to act under the quality standards established by Y. On the other hand, state X provides its own quality standards, completely inconsistent with the law of Y. The question is: which state has the power to regulate this aspect of social life? To give an answer, it is necessary to categorize the types of possible situations of norm's concurrence.

Here, one ought to distinguish three main categories of concurrence: 1) apparent concurrence, i.e., a situation where one state's competence falls into the category of exclusive competence, 2) a concurrence of two equal competencies whereby norms are not in conflict, and 3) a situation of concurrent competencies to set standards combined with the occurrence of contradictory norms. Each of these categories is analysed further below regarding the rule of reason, which constitutes the criteria that determines the limits of legislative jurisdiction.

In this context, the least doubt arises in relation to circumstances where several states claim the right to set standards in a given situation, where one of them has exclusive competence in this regard. In this case, powers of other states are apparent. As noted above, powers related to the exclusive area in the strict sense effectively limit other entities'

powers. The scope of powers instituting the exclusive area must be determined individually for each state. In this respect, a clear distinction should be made between the power to set standards understood as creating binding directives of conduct addressed to an individual, and the right to inflict punishment for infringing the said regulations. The scope of these powers is not concurrent – thus, it might be that the court of the forum state imposes a penalty for infringement of the norms of a foreign state.

However, the scope of legislative competencies is very different in a situation where no entity has the exclusive right to regulate a specific matter, though at the same time, there is no contradiction regarding the wording of norms. Two categories of situations can be specified here. Firstly, the cumulative power to set standards occurs in the case of norms that protect universal interests that satisfy the requirements specified above (e.g., prohibition of slavery). Here, no issue of discrepancy in terms of the content occurs since they are determined by a consensus successfully set on the international level. In the case of concurrent norms, they can be freely granted the value of validity at the very same time. Thus, neither does the sovereignty of a foreign state become violated nor do norms of international law become infringed. Theoretically, one could pursue to determine a state which has exclusive powers, though it would be pointless with regard to the concurrence of norms in terms of their contents. Secondly, the similar would apply to a situation where one of the norms imposes higher standards of conduct when the state that has set them has a stronger right to set standards. An executed disposition of a norm of state X would remedy a disposition of state Y.

The last case of concurrent legislative jurisdictions is a situation where entities who have the power to set standards lay down contradictory regulations, whereby an executed disposition of a norm of state X infringes on a norm of state Y and *vice versa*. Here, the concurrence of competencies is combined with a conflict of norms that must be resolved by limiting the validity of one of these norms. Only in this way can an individual who undertakes a given conduct have the chance to behave in accordance with the law. The analysed conflict ought to be resolved by recourse to weighing nexuses, assuming that the value of validity pertains to the norm that was laid down by the state with a stronger legitimacy under the rule of reason.

However, it ought to be noted that in a situation where the subject of protection is a universal value while the standard of protection introduced *prima facie* by a foreign norm is unacceptably low, one possibility is that this norm is not binding due to its wording and not – as in the case of weighing nexuses – due to the stronger power of the forum state. The question of the criteria that determines the limits of non-acceptance remains open. This issue cannot be solved based on this paper alone since the standard itself is not as much already developed as under development by the practice of states<sup>139</sup>; among extremely unjust norms one must list, i.e., those permitting commitment of international crimes classified as the so-called core crimes<sup>140</sup>. This notion is subjected to analysis further in the paper.

It is important to underline that the spatial scope of the competence to set standards for directives should be determined individually for each standard-setting expression. This entails significant consequences. In the case of making a criminal law assessment of behaviours executed abroad, it might be obligatory to construct norms of national law based on standard-setting expressions derived from various legal systems. In this approach, potentially “concurrent” standard-setting expressions are eliminated primarily by excluding the competence of state Y to set up the provision  $P_{Y1}$  and simultaneously recognising the competence of the state X to set up the provision  $P_{X1}$ . The said provision becomes a constituent of the norm N interpreted by the court of state Y. Thus, as a result, a sanctions norm that can be described by the following equation is interpreted:  $N = Z - (P_{X1} + P_{Y2} + P_{Y3})$ . Individual standard-setting expressions derived from various legal systems are hence combined into a single norm due to an interpretation by the court of the forum state

139 Hathaway, *supra* note 10, at 148; Donnelly, *supra* note 83, at 151–152; Marcelo D. Varella, *Internationalization of Law. Globalization, International Law and Complexity* 221–247 (Springer 2014).

140 Ryngaert, *supra* note 7, at 116; Mark Lewis, *The Birth of the New Justice. The Internationalization of Crime and Punishment, 1919-1950* 284–285 (Oxford University Press 2014); Cynthia Sinatra, *The International Criminal Tribunal for the Former Yugoslavia and the Application of Genocide*, 5 Int'l Crim. L. Rev. 417–418 (2005); Cherif M. Bassiouni, *Crimes Against Humanity. Historical evolution and contemporary application* 263–269 (Cambridge University Press 2011), especially, when he cites M. Whiteman: “obligations owed to the international community as a whole, stating that such obligations derive, for example, in contemporary international law from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination”.

or by an entity who is the addressee of the norm. In the norm-decoding process, one ought to take into consideration only these directives, which are characterised by the competence to set standards.

### 3. *Ius puniendi* in the international context

In the background section, the *ius puniendi* was defined as the competence of the state to perform the four functions of criminal law: protective, justice, guarantee and restorative. All of them are strongly connected with the idea of criminal law as *domaine reserve*. This approach is no longer appropriate when these functions are considered in the international framework.

In a “domestic” situation, without international context, the protective function is fulfilled by the implementation of penal provisions, which are coherent with other elements of domestic legal system (e.g., administrative law). Penal norms support the others by providing sanctions for breaching the law. In the international context, the situation gets complicated when penal norms set up by the forum state not only entail a sanction for infringement of law but also create a certain autonomous directive of conduct addressed to the individual<sup>141</sup>. After all, general prevention, both in its negative and positive aspect, is focused on forming attitudes of society as a collective<sup>142</sup>. Just for example, one state establishes the provision: “Whoever, who terminates the pregnancy of women is subject to the penalty of imprisonment for up to 3 years”. It is quite clear that such a norm has not only penal but also regulatory character. It prohibits abortion and not only imposes the punishment. This, in turn, may obviously result in an infringement of the foreign state’s sovereignty. Because of that fact, the scope of competence to execute the *ius puniendi* in the aspect of protective function shall be considered in a context of the scope of legislative jurisdiction. This issue is subject to analysis further in the article.

The need for rightful retribution (justice function) for the performed acts now is not limited to the place of the act located outside the borders

<sup>141</sup> “Regulative rule such as ‘Thou shall not kill’ are constraining in that they order us to adopt a certain behaviour” – Kratochwil, *supra* note 3, at 26.

<sup>142</sup> Jodłowski, *supra* note 68, at 255; Bayles, *supra* note 67, at 281–282.

of a given state. Due to an increasingly closer international collaboration on the individual level, boundaries between individual societies understood as communities with shared interests become blurred. The German or Polish society would demand that the perpetrators of the attacks in Paris be punished just as the French society would. The mass media development and the progressing globalisation processes resulted in the fact that many behaviours that have recently had a local nature, today affect societies of foreign states with all intensity. One can readily imagine a situation where a murderer acts within the territory of one state, brutally murdering only incoming journalists, filming acts of violence and publishing them on the Internet. It seems unlikely that in such a case societies of foreign states are less moved by the perpetrator's act than the population of the state where the acts take place, especially in the era of mass media development, when as a matter of fact, information about a murder can raise concerns across the entire globe<sup>143</sup>.

Striving to exercise the justice function may be characterised by varying intensity depending on the nature of the attack, the type of legal rights or, lastly, the carrier's characteristics. By exercising *ius puniendi* with the intent to satisfy the society's need for punishing, the forum state may remain in conflict with powers of foreign states on two levels. Firstly, it might result in compromised interests of a foreign state by imposing a certain standard of handling legal rights. Secondly, considering the increasingly broader application of the *ne bis in idem* principle in international law<sup>144</sup>, the result might be that the possibility to exercise the justice

143 This may be illustrated by materials distributed by the Islamic State, which constitute the records of the execution. What is interesting, theoretically, is that the above argument can be reversed. The lack of criminal liability limits may entail the extension of the positive liability boundaries. This, in turn, can significantly affect, for example, criminal liability on the ground of Article 162. § 1 of Polish Penal Code, which stipulates: "Whoever does not provide assistance to a person being in an immediate danger of loss of life or sustaining a grievous bodily harm, even though he could have provided it, is without exposing himself or another person to a danger of loss of life or sustaining a grievous bodily harm, is subject to the penalty of deprivation of liberty for up to one year" – translation: W. Wróbel, A. Wojtaszczyk, W. Zontek, *Kodeks karny. Przepisy dwujęzyczne. Criminal Code*, Warszawa 2014, p. 153. By means of the mass media, it is possible to provide reliable information about a dying person who can be rescued by paying money to, say, the Red Cross – a failure to pay could mean the execution of a crime. See: P. Hulsroj, *The Principle of Proportionality...*, p. 39.

144 Gerard Conway, *Ne Bis in Idem in International Law*, 3 Int'l Crim. L. Rev. 217–244 (2003); Sakowicz, *supra* note 83, at 89–133.

function by the entity with a stronger right to punish becomes excluded. In both cases, the interest which is in a conflict with the need to satisfy the sense of justice is the sovereignty of the foreign state. Importantly, any potential disputes arising with regard to this matter are related to the applicability of norms of substantive law under a specific case – oftentimes these can be resolved on the procedural level.

Considering the guarantee function and the *nullum crimen* principle in the light of conditions for liability for crimes committed abroad, one ought to note two essential matters. Firstly, contrary to the protective function and the justice function, where on the level of setting up norms of substantive law, the reference point was the interest of a certain collective striving to protect a specific value system or to satisfy their own sense of justice, in the case of the guarantee function, the central element is the interest of the perpetrator, in respect of whom the state exercises a sovereign competence. In this case, a significant factor that limits the right to punish is the need to respect human rights and not – as in the case of the protective function or the justice function – the sovereignty of the foreign state. Secondly, considering the above, one ought to note that the norm of conduct that the perpetrator is bound to in a given situation should be determined from his or her point of view. The above issue is significant insofar that the nature of the penal norm repressions, which serve as the grounds for the imposition of a penalty, is not the same that could potentially affect the perpetrator at the moment of the act. However, these must be characterised by the same content<sup>145</sup>. To a certain extent, the right to punish cannot be exercised by the forum state due to the need to exercise the *nullum crimen* standard. The guarantee function excludes the possibility of executing the remaining objectives of criminal law. In view of the power to set up norms of substantive law that are subject to a prohibition, this presupposes primarily a need to interpret the contents of norms in a way that narrows them down to limits determined by the *nullum crimen* standard. This is examined in a broader perspective further in the article.

Providing the victim with a significant role in the process of executing the right to punish also affects the conditions for the liability for

<sup>145</sup> What is important is the content of the norm, and not its source, see: Franciszek Studnicki, *Znajomość i nieznanomość prawa* [Knowledge and Ignorance of the Law], 206 Państwo i Prawo 578 (1962).

crimes committed abroad since, in the view of the forum state, the power to exercise *ius puniendi* grows stronger as long as the victim of the crime is a person who remains related to the said state<sup>146</sup>. Furthermore, it seems that the victim's stay within the territory of the forum state may constitute a certain condition for holding the perpetrator liable even in a situation where there is no specific personal proximity between the forum state and the victim. Though the victim's stay within the territory of the state does not constitute a jurisdictional nexus in its own right, it might be an argument supportive of the state's claim to punish the perpetrator. It could find application particularly in cases where *ius puniendi* is exercised under the principle of substitutive criminalisation<sup>147</sup>.

Considering the *ius puniendi* as a right to impose punishment for acts committed abroad, it is necessary to take into account the above context. All the functions of criminal law seem to have features, which are not very important in "domestic" cases but shall be taken into account while deriving penal norms in international situations. As it was said, executing *ius puniendi* can disturb not only the sovereignty of another state but also values protected under human rights. The next part of this work contains the analysis of the possible ways of these violations. All of them are illegal from the perspective of international law. By establishing the boundaries of illegality, it will be possible to describe the scope of legal extent of *ius puniendi*.

### 3.1. Sovereignty of foreign states as a limiting factor of *ius puniendi*

Conflict of sovereignties in a context of executing *ius puniendi* may manifest itself in two ways. The first one pertains to concurrent scopes of *ius puniendi* of two eligible states, both of which strive for executing the criminal law function. Alternatively, the *ius puniendi* of the forum state may remain in conflict with another competence of a foreign state, particularly the right to protect one's own culture and to establish law in line with the underlying value system. In both cases, the condition

<sup>146</sup> Geoffrey R. Watson, *Offenders Abroad: The Case for Nationality-based Criminal Jurisdiction*, 17 Yale J. Int'l L. 61 (1992); Regula Echle, *The Passive Personality Principle and the General Principle of Ne Bis In Idem*, 9 Utrecht L. Rev. 56–57 (2013).

<sup>147</sup> Ryngaert, *supra* note 7, at 103; *Extraterritorial Criminal Jurisdiction*. Council of Europe, *European Committee on Crime Problems*, 3 Criminal Law Forum 452 (1992).

for applying *ius puniendi* by the forum state is to prove that the value of thus fulfilled interests outweighs the value of the sacrificed interests.

Wherever the value systems underlying penal norms are concurrent, the potential violation of sovereignty consists in punishing the perpetrator in a way that allows *ius puniendi* to be exercised by a different eligible state (due to the place of the act, the perpetrator's citizenship, etc.). *Ius puniendi* is traditionally considered by international law an exclusive power of the state<sup>148</sup>. However, this exclusivity amounts to a statement that no other state can either prohibit or impose a penalty for a given act on behalf of the eligible state in a way that results in an exclusion of its right to punish<sup>149</sup>. Nevertheless, considering the increasing respect for the principle *ne bis in idem* in international law<sup>150</sup>, the matter of determining the precedence in exercising *ius puniendi* becomes of vital importance. The mentioned limits do not have a substantive character, though, while the dispute takes place on the level of law application and is related to procedural obstacles<sup>151</sup>. Considering the above, the issue outlined in this paper remains beyond the scope of a broader analysis provided herein.

The matter of the limits of *ius puniendi* is very different in a situation where the power of the forum state remains in conflict with another power that can be defined as the right to shape the domestic law<sup>152</sup>. As a political organism, the state has the right to determine social relations within its borders in a way that ensures the broadest possible execution of the culture standard relevant for the society that makes up its population. Each state has the right to protect the values it views as deserving to be protected with due respect for the sovereignty of third states and human rights. In practice, it might be thought that some behaviours regarded as negative and deserving of penalisation from the view of the forum state remain within the scope of social acceptance if assessed taking into account the cultural context binding in the place of the act. In this case, a potential infringement of sovereignty may consist in forming a condition where the individual has to take into consideration norms of foreign

148 Sakowicz, *supra* note 83, at 161; Hallevy, *supra* note 18, at 86.

149 The dysfunctionality of such an approach in the era of European solidarity is highlighted by A. Sakowicz – Sakowicz, *supra* note 83, at 161.

150 Sakowicz, *supra* note 83, at 95–96.

151 On possible methods of resolving conflicts of jurisdiction – Sakowicz, *supra* note 83, at 436–462.

152 Jackson, *supra* note 10, at 123.



law in his or her actions. Thus, the forum state affects the social organisation, circumventing the limits set by the scope of legislative jurisdiction. Moreover, one ought to take into account that individually protected legal rights do not function separately but affect one another. An introduction of an additional norm of conduct into the domestic law system – as one ought to consider the execution of the assumptions laid in the general prevention – may result in a disturbance of the existing balance. This condition should be taken into consideration in the process of setting up the limits of *ius puniendi*. In the case of crimes committed abroad, the execution of the general prevention objectives is thus possible only to the extent the content of penal norms coincides with the content of norms of conduct of a state that has the competence to set standards in a specific social situation (alternatively, with norms derived from international law).

Considering the above, one should specify the category of conditions that ought to be taken into account in the assessment of the forum state's power to lay down an abstract criminal law norm in a given case. In the view of international law, it would be necessary to weigh the interests of individual entities. To this end, it is vital to define the values covered in the dispute, which should be specified in the greatest possible detail. It does not suffice to make a general statement that boils down to playing off powers to set up internal affairs and rights that comprise *ius puniendi* against each other. Moreover, it seems necessary to situate these values in a cultural context. Only then would it be possible to determine their significance. In practice, this serves as the source of significant complications related on the one hand with the way in which these rights are defined and, on the other, with the way they are weighed. Hypothetically, clear situations can also occur – such an unauthorised interference takes place in a situation where the sanctioned norm of conduct requires the addressee to violate another state's interests. In most cases, assessment gives rise to serious problems.

Let us use an example<sup>153</sup>. State X introduced a commonly binding norm that imposes penalties for verbally abusing its citizens regardless

153 The example above is a modification of the real case of A.K. Cutting, who was insulting a Mexican citizen within the territory of the US. See: Geoffrey R. Watson, *The Passive Personality Principle*, 28 Tex. Int'l L.J. 5–6 (1993); Ryngaert, *supra* note 7, at 62; John B. Moore, *Report on Extraterritorial Crime and the Cutting Case*, United States Department of State 130 (1887).

of the place of the act and dual criminality. The *prima facie* norm is binding also in the territory of state Y whose citizens give much value to free speech and do not penalize verbal abuse. To verify if validity of the norm alone constitutes an infringement of state Y's sovereignty, one should specify the way in which the validity of an abstract penal norm prohibiting verbal abuse of X citizens affects the limitation of the value of free speech in the state of Y, thus specifying its place in the hierarchy of legal rights. On the other hand, it would be vital to specify the extent to which invalidity of the said norm leads to a lowered standard of protection of the legal right in the form of honour of a citizen of state X during his or her stay in state Y, simultaneously specifying the place of this legal right in the place of this legal right in the hierarchy of values of X citizens.

The subsequent step is to compare these two values with account to a condition that the event discussed took place in the territory of state Y and the perpetrator was a citizen of that state (nature of a nexus), whereas the sole element that related the crime with state X was the victim's identity. The situation is further complicated by the fact that, in practice, the above assessment must be made by a body of the forum state at the stage of creating or applying the law. Therefore, there is a risk that it would be an expression of the state's interests and not a result of weighed objective arguments. If, according to the result of the thus-performed evaluation in a specific case, the execution of the right to punish in the substantive aspect leads to an excessive limitation of the foreign state's sovereignty, the norm of substantive law laid down by the forum state must be deemed not in force. The criminal law of the forum state cannot serve as a tool for imposing specific cultural standards. Thus, in this situation it is not as much a clash of individual competencies that takes place but of the axiological systems they secure. Both the forum state and other countries entitled to regulate conduct or solely to punish the perpetrator result in taking under their protection a system of values that best reflects the axiology of the society in the name of which the administration of justice is exercised. The greater cultural differences between the competing entities, the greater the probability of conflict, while the lesser cultural diversity, the lesser the possibility of infringing the foreign state's sovereignty.

In practice, situations where the forum state can introduce an effective extra-territorial prohibiting norm subject to sanction without the

need to take into account other entities' sovereignty are also possible. What is more, situations where the introduction can be performed by the forum state can also occur. This is possible in two cases. The first is when a given social situation is not subject to any state authority. Such events are rare, since even in cases where the perpetrator commits murder within the territory that is not subject to any authority his or her conduct can be regulated based on a personal jurisdictional nexus. Secondly, in cases where the eligible state sets up norms of conduct with regard to a given legal right that infringes the standard of human rights protection. In this regard, the way of exercising sovereignty is not protected by international law – a norm set up by the forum state, which is in conflict with the legal order of the state where the act was committed is not illegally compromising its sovereignty. This issue is discussed further in the paper.

### **3.2. Human rights as a limiting factor of *ius puniendi***

The impact exerted on the national *ius puniendi* by norms of international law that constitute the system of human rights protection ought to be examined on two levels: a state–state level and a state–individual level. Here, it seems vital to take into account interests of at least three entities: 1) the forum state, whose interest is to execute criminal law objectives; 2) the foreign state, whose power is to set up standards of social relations and to execute *ius puniendi*; 3) the perpetrator, who has the right to know the wording of the law to which he or she is bound to and the right to behave in line with the standard relevant to the society of which he or she is a member.

When examining the impact of human rights on the shaping of limits of *ius puniendi* in the state–state perspective, one ought to stress that the issue here is not the conflict between sovereignty and fundamental values derived from human dignity. If there is a clash of competencies of two states representing concurrent cultural standards that do not compromise human rights, such a conflict does not take place, for in this case, the conflicting values are two sovereignties, whereas the dispute itself boils down to weighing the significance of nexuses. Thus, the arguments presented below refer only to cases where the secured standards of human rights protection are divergent. The scope of powers of the forum state depends on the nature of this conflict.

First of all, in a situation where human rights are significantly infringed within the territory of a given state, such as in the case of international crimes, all the states have the right to punish individuals guilty of this sort of act under the principle of universal jurisdiction<sup>154</sup>. Furthermore, each state that does not exercise its competence is obliged to surrender the perpetrator to the entities interested in prosecution under the principle of *aut dedere aut iudicare*, which is binding in this regard<sup>155</sup>. In the case discussed, virtually all states enjoy broad powers, including procedural rights. As shown in the Adolf Eichmann case, when international crimes come into play, the accepted interference with a foreign state's sovereignty includes even an abduction of the perpetrator with the intent to bring him to justice<sup>156</sup>.

However, it might be that the perpetrator's behaviour, though an infringement to the fundamental values provided for under human rights, does not constitute an international crime and is simultaneously regarded as licit upon the law of the place of the act. It was noted above that each state can freely shape the legal system as far as to the limits set by human rights and the sovereignty of other states. However, a question arises as to what extent the state is obliged to ensure a proper standard of security for rights derived from human dignity and to what extent foreign states are eligible to punish the conduct of a given individual that compromises thus defined rights. To provide an example of the

154 Iwanek, *supra* note 84, at 128. In the last two decades there have indeed been two cases of prosecution of international crimes in absentia – see: Ved P. Nanda, Christopher K. Hall, Wolfgang Kaleck, Diane Orentlicher, *Universal Jurisdiction. It's back!*, 102 Am. Soc'y Int'l L. Proc. lii 397–404 (2008); Naomi Roht-Arriaza, *The Pinochet Effect and the Spanish Contribution to Universal Jurisdiction*, in: *International Prosecution of Human Rights Crimes* 113–124 (Wolfgang Kaleck et al. eds., Springer 2007).

155 Meron, *supra* note 83, at 209. It should be indicated in the doctrine that there is a controversy over the scope of the commitment, and some researchers point out that in this case it comes to the entitlement, not the obligation to prosecute – see: Iwanek, *supra* note 84, at 111. In view of the judgment in *Belgium v. Senegal*, I.C.J. Reports, Advisory Opinions and Orders Questions Relating to the Obligation to Prosecute or Extradite, Judgment of 20 July 2012, such a position appears to be out of date in the case of states which are parties to relevant international conventions (see e.g.: UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, Art. 27).

156 Sidney Liskofsky, *The Eichmann Case*, 62 American Jewish Year Book 199–208 (1961); Kau C. Randall, *Universal Jurisdiction under International Law*, 66 Tex. L. Rev. 810–815 (March 1988).

above, one ought to ask what is the extent of state X's right to punish a perpetrator who is a citizen of state Y and who committed a common murder within the borders of state Y, given that, in the light of the norms the perpetrator is bound to due to the presence of classic jurisdictional nexuses, the said murder did not constitute a crime.

In the above example, in view of a state with the standard-setting powers, it is not only the protection of the exclusive right to punish that is at stake but the protection of a certain pathological (in the view of human rights standard) cultural standard. Values involved in human rights protection remain in conflict not solely with sovereignty but with other underlying values of the system. The conflict takes place when the law, which the perpetrator is *prima facie* bound to, allows values covered by the protection of universal human rights<sup>157</sup> to be infringed to the extent that a permit itself constitutes an infringement of these rights. This would apply to norms excluding penalisation for an honour killing yet, as it seems – also in numerous other less drastic situations. In the view of human rights, the main objection pertains to shaping the legal system in a way that does not ensure proper protection of an individual's fundamental rights, resulting in an infringement of international law. The state cannot execute its competencies arising under its sovereignty in the above manner, whereas legal protection of thus defined standard constitutes in itself an infringement of human rights. In this case, the forum state is no longer limited in the execution of *ius puniendi* by the third state's sovereignty and can hence make use of the right to punish to an extent required by human rights protection. Therefore, in the view of sovereignty, it is permitted to punish the perpetrator both for an act considered lawful under domestic law and for an act that faced an inadequate response, which is, actually, an expression of consent to penal acts (e.g., imposing a fine as a penalty for murder). Here, one ought to stress that it is not the perpetrator's act that is being assessed but the normative context in which the act was committed. In this view, the entire interpretive effort taken to provide an assessment whether in a given situation exercising the right to punish entails an infringement of a foreign state's sovereignty ought to focus on proving that, in the reality of a given case, the domestic law was shaped by the said state

157 Iwanek, *supra* note 84, at 91; Czepek, *supra* note 86, at 23, 172–173.

in a way that triggered an infringement of binding responsibilities that comprise human rights<sup>158</sup>.

Apart from the legitimising function, human rights also have a limiting role with regard to the right to punish. Considering that the addressees of human rights are mainly states<sup>159</sup>, one ought to assume that it is the aspect of human rights that has the most significant implications on *ius puniendi*. The forum state, which exercises its powers under *ius puniendi*, extends its authority over the perpetrator. At the same time, the said perpetrator operates within set cultural standards defined primarily by the law of the place of the act. Some rules of conduct he or she acts in line with have a legal nature, while others are derived from life experiences or commonly accepted moral indications. When undertaking his or her conduct, the perpetrator ought to have the capacity to tell what is legal and what is prohibited on pain of penalty<sup>160</sup>. Moreover, the perpetrator has the right to behave in line with his or her own value system<sup>161</sup>. In this regard, one can note two values protected under the human rights protection system. Firstly, every person has the right to behave in line with the value system of his or her own culture: human rights ensure freedom of thought, conscience and religion, the right to raise children according to their own beliefs. Secondly, a person who performs a given behaviour has the right to know which behaviour is prohibited on pain of penalty. Here, protection consists in taking the *nullum crimen*<sup>162</sup> standard into consideration. Both of these values affect the scope of *ius puniendi*.

With regard to the first of the issues described above, one ought to note that the matter of conduct in a different cultural reality can be reduced to two problems.

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158 As stated above, the scope of these obligations will depend on the content of international norms binding on the state.

159 "International documents clearly recognize the states as first violators of human rights and they indicate that the primary responsibility for protecting human rights will also belong to states. With respect to ensure this obligation of states operating as a protector and violator in the same way, the system has been internationalized" – Zohadi, *supra* note 87, at 100. Czepek, *supra* note 86, at 15.

160 Shahram Dana, *Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing*, 99 J. Crim. L. & Criminology 862 (2008–2009).

161 Czepek, *supra* note 86, at 208–213.

162 Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 Geo. L.J. 172–188 (2008); Dana, *supra* note 160, at 867.

It might be the case that an individual's behaviour, though meeting the criteria of a crime in the view of the forum state, is allowed by compulsory norms at the moment of the implementation of the action, whereas the wording of the said norms does not infringe the human rights protection standard. For instance, state X grants permission for risky financial transactions as a result of which a business could incur losses, while state Y penalises this type of conduct. In this case, the forum state has no right to establish a prohibitive binding norm subject to a sanction that affects the shape of the domestic organisation of state X to a broader extent than under state Y's legislative jurisdiction. Moreover, the right to live in line with a culturally determined and internalised value system is a value protected under international law. The forum state is obliged to respect this liberty. Consequently, even in a situation where an individual familiarises himself with the law of the forum state, he or she will not be obliged to obey the prohibitions or orders subject to sanctions covered by the said law.

The situation is different when the perpetrator's behaviour constitutes an infringement of human rights in itself which, considering that no standard pertaining to the protection of such rights is *prima facie* taken into account, does not constitute a crime in the light of norms the perpetrator is bound to at the moment of the act. Here, two types of situation can be distinguished.

On the one hand, it might be that, as a result of no implementation of rules that secure human rights in the national law, the individual internalises the standard that infringes values included in the human rights protection. In this case, though it cannot by any means determine the lack of liability *in abstracto*, one ought to note that the main burden of guilt for this state of affairs is on the state that introduced the unacceptable legislation. Though the above condition does not result in an exclusion of the forum state's powers to establish abstract norms that would prohibit such infringement, it should be taken into account in the criminal law assessment of the act, at the stage of imposing the penalty or by means of allowing for an excusable error of the law as a circumstance excluding criminal liability<sup>163</sup>. In fact, we are dealing here with a lack of awareness of the validity of a norm that prohibits a given behaviour. In this case,

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<sup>163</sup> Grabowski, *supra* note 93, at 555–558.

the forum state that defends human rights has the right to introduce a general prohibitive norm subject to sanction, the application of which can be subsequently limited using legal constructs as early as at the stage of attributing agency or the measure of penalty.

On the other hand, it might be that the perpetrator, aware of the pathological content of norms valid in a given area, uses them in a somewhat instrumental way to do wrong. Here, there is no conflict between the value of the right to behave in line with the internalised axiological system derived from culture, but with human rights. There cannot be any internalisation and, hence, it is impossible to refer to an error in the law. The fact of being within the borders of a foreign state does not justify the wrong committed by the perpetrator who takes his unfaithful wife on a trip abroad only to take her life there with the full consent of the binding law.

In the light of the above, in the case that an act that infringes human rights is committed abroad, on the level of the conflict between the right to act in line with the value system and values derived directly from human dignity, the former has to give way to the latter.

Exercising powers that comprise *ius puniendi* may also remain in conflict with the value of legal certainty and the described *nullum crimen sine lege* principle. According to the said principle, no one should be subject to punishment for an act that did not constitute a crime at the time it was carried out<sup>164</sup>. In this respect, a conflict between individual objectives of criminal law becomes more prominent. A fully exercised justice function or protective and compensatory function might hamper exercising the guarantee function described in the light of the *nullum crimen* standard. It imposes on the state an obligation to inform individuals of types of behaviour considered punishable<sup>165</sup>, thus limiting lawbreaking (lawmaking). In the case that no proper information is issued, the court has to decide not to apply a norm that violates the *nullum crimen*

164 Claus Kreß, *Nulla poena nullum crimen sine lege*, in: Max Planck Encyclopedia of Public International Law (2010) <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e854?rskey=tG32hx&result=1&prd=EPIL>; Dana, *supra* note 160, at 862; Guido Acquaviv, *Revisiting Classics. At the Origins of Crimes Against Humanity: Clues to a Proper Understanding of the Nullum Crimen Principle in the Nuremberg Judgment*, 9 J. Int'l Crim. Just. 883–884 (2011).

165 Dana, *supra* note 160, at 862.



principle (application aspect<sup>166</sup>). This is traditionally linked primarily to the temporal aspect of the validity of a legal act<sup>167</sup>; however, if translated into the context of liability for acts committed abroad, a question arises whether it should also be considered with regard to the territorial aspect<sup>168</sup>. From the perspective of an individual, there is no significant difference whether the norms that are applied to him or her have been introduced into the legal system following the occurrence of the act or have been expressed as part of a legal system that is completely unknown, which he or she had had no obligation or opportunity to familiarise herself or himself with.

Considering the above, a question arises as to the extent to which a given state's power to set up penal norms is limited by a requirement to observe the *nullum crimen* standard. In order to answer this question, it seems vital to seek norms of international law that refer to the said principle. Though the *nullum crimen* principle is customary<sup>169</sup>, it has been specified in detail in the convention law. A thus established standard is binding in the Republic of Poland and other states that are bound to the letter of treaties<sup>170</sup>. The limits of *ius puniendi* are provided for, i.e., the Universal Declaration of Human Rights<sup>171</sup>, the ICCPR<sup>172</sup>,

<sup>166</sup> Alchourrón & Bulygin, *supra* note 96, at 141.

<sup>167</sup> Kreß, *supra* note 164; Dana, *supra* note 160, at 866; Fabien Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* 108 (Brill-Nijhof 2008); Acquaviv, *supra* note 164, at 883; Shahabuddeen, *supra* note 80, at 1008.

<sup>168</sup> Dana, *supra* note 160, at 870.

<sup>169</sup> Dana, *supra* note 160, at 871; Kreß, *supra* note 164.

<sup>170</sup> Kreß, *supra* note 164.

<sup>171</sup> UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), the Article 11: "1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. 2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."

<sup>172</sup> UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, the Art. 15: "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby. 2. Nothing in this article shall prejudice the trial and punishment

the ECHR<sup>173</sup> and the CFR<sup>174</sup>. Each of the listed legal acts limits the scope of the right to punish for an act that constitutes a crime under the law the perpetrator is bound to at the moment of performing the said act (“domestic law” under the ICCPR and the ECHR, and “national law” under the Universal Declaration and the CFR, respectively). The content of the commitments ought to be analysed with regard to two objectives. Firstly, it should be determined whether by referring to a specific nature of the act it is examined solely in the temporal aspect or they refer to the validity of the law in space. Secondly, to the extent to which they allow penalisation of acts not provided for in domestic law, sources of international laws that serve as the basis for exercising *ius puniendi* ought to be determined.

One ought to begin his or her considerations from the first of the depicted issues. Here, the essence of the dispute comes down to the meaning of the phrases “domestic law” and “national law”, which ought to be considered one and the same. In legal science, the emphasis is put

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of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”

173 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, the Art. 7: “1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.” It should be emphasized that the *nullum crimen* principle is a rule that cannot be limited or excluded even during armed conflicts. See: Jakub Kociubiński, *Zasada “nullum crimen, nulla poena sine lege” i jej ograniczenia w orzecznictwie ETPC* [The Principle of “nullum Crimen, Nulla Poena Sine Lege” and Its Limitations in ECTHR Jurisprudence], 28 Nowa Kodyfikacja Prawa Karnego 269–283 (2012); Liżewski, *supra* note 83, at 287; Kreß, *supra* note 164.

174 European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, the Art. 49: “1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable. 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.”

primarily on the temporal aspect of a principle<sup>175</sup>. However, according to Piotr Hofmański, when it comes to the place of the act, Article 7 must be interpreted in a way that allows “domestic law” to be understood as “the law of the location of the perpetrator’s act”. Such an intuition seems valid – the meaning of the *nullum crimen* principle is to protect the perpetrator against punishment for behaviour that was not known to the perpetrator as punishable despite exercising due diligence<sup>176</sup>. The above statement deserves partial approval and still calls for a more amplified approach, as it pertains, not solely to the law of the place of the act, but also to the legislation of states that have a standard-setting power due to the presence of legally relevant nexuses. One can still distinguish two groups of entities: those who have the competence to establish norms of conduct and those who do not have such competence. Norms set up by entities classified with the first group constitute the “domestic law” or the “national law” under the above-listed acts of international law. These are the sole acts that can regulate an individual’s conduct at the time he or she performs the act, but they also pertain to the impact exerted on that individual as part of exercising the protective function.

The above statement has significant consequences. To satisfy the *nullum crimen* standard, it ought to be proven that, in the reality of a given case, the perpetrator’s act was punishable under binding provisions. The specific source of this prohibition subject to penalty is irrelevant as long as it remains in line with norms of international law. The matter of ignorance of the law should be referred to the content of a norm and not its origin<sup>177</sup>. The *nullum crimen* principle refers to the content of a prohibition/order subject to penalty and not to its source. The above statement is supported by the case law of international courts of justice<sup>178</sup>. Therefore, according to the *nullum crimen* principle, the state may introduce a norm that imposes a penalty for any behaviour performed abroad provided that it constitutes a crime also under international law or national law that the perpetrator was bound to at the moment of

175 Kreß, *supra* note 164; Shahabuddeen, *supra* note 80, at 1008.

176 Piotr Hofmański, *Komentarz do Art. 7 [Commentary on Article 7.]*, in 1 *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Komentarz do artykułów 1–18 [1 Convention on the Protection of Human Rights and Fundamental Freedoms. Comment on Articles 1–18]* 462 (Lech Garlicki ed. 2010).

177 Studnicki, *supra* note 145, at 580.

178 Schaack, *supra* note 162, at 158–172.

performing the act. In many cases, the perpetrator's act is considered punishable by representatives of all cultural backgrounds, while the need to specify the basis for the validity of a given norm comes down to a formal requirement that ensures the consistency of dogmatic concepts. The more significant the cultural differences, the more important it is to communicate the norm effectively<sup>179</sup>.

Thus, to define the limits of *ius puniendi*, it is vital to specify in which cases a given behaviour may be considered a punishable criminal act under international law or foreign law. If one succeeds in proving that such penalisation takes place using commonly accepted criteria, the *nullum crimen* principle will not be infringed by the forum state. The nature of these criteria cannot be subject here to a detailed analysis due to a limited volume of this paper – in this respect, one ought to refer to subject literature and the case law of international courts of justice<sup>180</sup>. Considerations pertaining to this issue should be limited solely to a statement that a behaviour over which a criminal court has jurisdiction under the law of the eligible state (the “domestic law”) constitutes an indictable offence. It appears though that, taking into account the objective of the *nullum crimen* principle related to the guarantee function of criminal law, the context of legal proceedings<sup>181</sup> indicated by the ECHR may serve as a criterion. Wherever a given behaviour is subject to the jurisdiction of the courts responsible for deciding on criminal liability and making decisions aimed at executing the criminal law function, the perpetrator's conduct may be deemed a punishable act.

As for the sources of international law that may potentially introduce conduct penalisation, one ought to indicate Article 38 of the statute of the ICJ, which provides for a list of sources of international law in general. These include international agreements, customs and general principles of law recognised by civilised nations<sup>182</sup>. Without subjecting

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179 Kratochwil, *supra* note 3, at 78.

180 Judgement of the ECHR, *Achour v. France*, no. 67335/01; Judgement of the ECHR, *Scoppola v. Italy* (no. 2) [GC], no. 10249/03; Judgement of the ECHR, *Del Río Prada v. Spain* [GC], no. 42750/09; Judgement of the European Court of Justice, *Degussa AG v Commission of the European Communities*, case T-279/02.

181 *Scoppola v. Italy*, *supra* note 180; Kociubiński, *supra* note 173, at 278.

182 United Nations, Statute of the International Court of Justice, 18 April 1946, the Art. 38: “1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general

them here to an in-depth analysis, it should be noted that, in line with the *nullum crimen* principle, considering a given act a crime under an international custom constitutes a condition that allows the national *ius puniendi* to be extended onto all behaviours of this type, regardless of the place of the perpetrator's act, the perpetrator's nationality, cultural context, etc. Usually, a custom should then be considered the strongest basis of penalisation, whereas national penal norms, which are a reflection of a custom, make use of the common nature of its validity. The matter of the law provided for in conventions is very much different<sup>183</sup>, as international agreements are binding only to the extent permitted by the powers of the individual states parties. This results from the fact that no one is competent to transfer to another one more rights than the former possesses, which pertains to both legislative jurisdiction and powers that comprise *ius puniendi*. Moreover, when treaties specify obligations for penalising certain behaviours, they refer directly to jurisdictional rights of the individual signatories<sup>184</sup>. The general principles of international law<sup>185</sup> provide for a possibility to penalize behaviours that are not criminalised in domestic law or in custom law or treaty law<sup>186</sup>. Considering that at present a new jurisdictional nexus is being formed, allowing one to refer to the need to protect human rights, the exemption analysed here loses its significance. To justify using *ius puniendi* by referring to Nuremberg clauses, one ought to prove that

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or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto."

183 Meron, *supra* note 83, at 90–92.

184 As an example, UN General Assembly, Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 2 December 1949, A/RES/317, the Art. 11: "Nothing in the present Convention shall be interpreted as determining the attitude of a Party towards the general question of the limits of criminal jurisdiction under international law."

185 Hofmański, *supra* note 176, at 462; Piotr Hofmański, *Konwencja europejska a prawo karne* [European Convention and Criminal Law] 305–306 (1995).

186 Kociubiński, *supra* note 173, at 281. In this context, however, it is advisable to quote M. Shahabuddeen: "it is not enough that the alleged act is merely immoral, it is enough that it is regarded by the community of nations as fundamentally criminal" – Shahabuddeen, *supra* note 80, at 1011.

there is no other basis for penalisation that would have a higher degree of definitiveness.

### 3.3. “Fluid” borderlines of an extraterritorial *ius puniendi*

In conclusion, it can be noted that the limits of *ius puniendi* are exceptionally fluid. They reflect a certain compromise between the power to exercise the criminal law function and the sovereignty of other states and human rights. This compromise is not as much developed, as developing in the course of historical progress and is subject to ongoing, yet slow transformations<sup>187</sup>. The states that take part in international transactions shape principles of their own criminal jurisdiction using numerous means and – in the light of the indefiniteness of rules – in a way that tests the scope of their powers both regarding legislation and the application of the law. Each state that sees its sovereignty infringed by another state’s excessively extended right to punish may bring proceedings in this regard before the International Court of Justice and thus verify the limits of *ius puniendi*, contributing to further specification of the “fluid” standard<sup>188</sup>. On the other hand – which is a significant new approach – in the case of states that recognise the jurisdiction of the European Court of Human Rights, such a complaint can be filed also by an individual who could prove that the respondent state’s excessively extended scope of *ius puniendi* has infringed his or her rights provided for in the European Convention for the Protection of Human Rights<sup>189</sup>. Simultaneously, all decisions of the state related to establishing criminal law norms in the broad sense must fall within thus determined limits – observing the directions comprising legislative jurisdiction on the one hand and the scope of the right to punish on the other.

187 Donnelly, *supra* note 83, at 57.

188 Also important is the case law of the national courts – in this respect: Meron, *supra* note 83, at 114–135.

189 According to the Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, the Art 34: “The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”

#### 4. Criminal law norms in the broad sense in the international context

The scope of the above-described competencies of the state that comprise legislative jurisdiction and the right to punish have a fundamental impact on the shaping of the limits of the validity of criminal law norms in space. Below is a method of interpreting a sanctioning norm and a sanctioned norm, which accounts for the limited nature of state authority. According to the assumption, it is to ensure the broadest possible execution of state powers comprising *ius puniendi* while taking account of the requirements of international law.

##### 4.1. Sanctioned norm in an international context

Deriving a sanctioned norm from two different categories of normative expressions (1. prohibition/order, 2. directives) will impinge on the way of settling the matter of criminal liability in the case of crimes committed abroad. It seems significant to have two matters settled. Firstly, one should determine the normative sources from which to decode individual constituent categories of a norm, and secondly, the scope of their competence to set standards.

As proven above, the source of a prohibition lies in criminal legislation, whereas directives come from non-penal normative expressions. Further considerations pertain to arguments supportive of a thesis that the said prohibition/order ought always to be derived from the law of the forum state, while the adequacy of directives might be derived from provisions of the forum state or foreign provisions depending on the reality of a given case.

Such a solution helps to achieve two very important goals within the scope of the criminal policy. On the one hand, it helps to take into account the need to ensure normative grounds for courts to deliver judgments that would be concurrent with the value system of the society on whose behalf it administers justice<sup>190</sup>. On the other hand, it supports the creation of a space for cooperation in terms of penalisation where *ius puniendi* is exercised with regard to other states' sovereignty and human rights.

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<sup>190</sup> Hallevy, *supra* note 18, at 83.

The key argument supportive of deriving the prohibition from the legislation of a state on behalf of which the right to punish is exercised is the need to ensure control over conditions of criminal illegality<sup>191</sup> for the forum state. This term should be understood as a characteristic of conduct that justifies the use of means of necessary self-defence in line with the Penal Code on the one hand (and thus indicates what is licit in the light of the legislation) and conditions the possibility to determine the punishability of conduct on the other. For if one was to assume that there is a general principle that justifies the use of foreign law only in reconstructing a sanctioned norm, he or she would have to accept an indefinite number of foreign norms of unspecified content being introduced into the legislation system of the forum state and taking them under the protection of national and sanctioning norms, as this is the essence of the mechanism of concurrent norms. Consequently, it would be inevitable to declare that the criminal law of the forum state sanctions the prohibitions/orders binding in other legal systems provided that their content can be related to the content of the sanctioning norm. This, in turn, could lead to axiologically unacceptable consequences, particularly regarding the recognition of specific behaviours as unlawful. In the view of international law, the forum state would thus waive the wide scope of rights derived from sovereignty (the right to establish prohibitive norms binding abroad) and transfer them onto all the existing foreign states. Moreover, interpreting a prohibition/order based on national law allows one to introduce relevant corrections in the content of a sanctioned norm. This takes place in the case of an introduction of a standard of protection into foreign law that is excessively low or high. This issue is examined further in the paper.

As far as a prohibition/order regarding a specific conduct is derived from the law of the forum state, the source of directives of conduct may lie in foreign legislation. This results from their character since they regulate individual aspects of life in a precise way and are seldom established as part of the area of a foreign state's exclusive power. For instance, in

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<sup>191</sup> The essence of criminal wrongdoing was echoed by E. Bulygin, writing: "All that is not penally prohibited is penally permitted". The fact that an action is penally permitted means that it does not incur penal sanctions, but it does not exclude the possibility that it may be prohibited by some other norm (e.g., a police edict, norm of civil law, etc.)." – Alchourrón & Bulygin, *supra* note 96, at 143; Darley, Carlsmith & Robinson, *supra* note 4, at 166.



a situation where a Polish citizen hits a pedestrian on a crosswalk in Great Britain, the actualisation of the sanctioning norms takes place as a result of an infringement of the sanctioned norm interpreted under Article 177 of the Penal Code, further specified by the relevant traffic regulations binding in the place of the act.

Therefore, the suggested interpretive method assumes forming of a mixed sanctioned norm consisting of standard-setting expressions derived from various legal orders (the formerly defined model takes on the following formula in this approach:  $N_Y = Z_Y - (P_{X1} + P_{Y2} + P_{Y3})$ <sup>192</sup>. This requires defining the limits of the competence to set standards of the two categories of expression, both a prohibition and individual directives that make its content adequate. To this end, one should refer to criteria that define the limits of legislative jurisdiction and the right to punish and apply them to both categories of standard-setting expressions. This constitutes the second of the issues distinguished above.

The prohibition/order is the central element of a sanctioned norm, without which a norm of conduct addressed to an individual cannot be considered a sanctioned norm, functionally conjugated with a sanctioning norm. Thus, the matter of determining the scope of its “competence to set standards”, also in the spatial context, is of key importance. Here, two possibilities can be indicated.

On the one hand, it might be said that the competence to set standards of a prohibition is determined in the very same way as in the case of the validity of sanctioning norms – with the use of criminal jurisdiction principles (territoriality principle, protective principle, universal principle, etc.<sup>193</sup>). In the case of the Polish Penal Code, these are provided for in Article 5 and in Chapter 13 of the Penal Code<sup>194</sup>. Nevertheless, this

<sup>192</sup> This approach seems to diverge from the widely accepted model assuming the interpretation of penal norms solely on the basis of national law – see: Hallevy, *supra* note 18, at 86.

<sup>193</sup> The principles of criminal jurisdiction have been described, among others, in the document *Extraterritorial*, *supra* note 147, see also: Doyle, *supra* note 2, at 13–15.

<sup>194</sup> Criminal codes of other countries: Strafgesetzbuch in der Fassung der Bekanntmachung vom 13. November 1998 (BGBl. I S. 3322), das zuletzt durch Artikel 1 des Gesetzes vom 30. Oktober 2017 (BGBl. I S. 3618) geändert worden ist [German Criminal Code], articles: 3, 4, 5, 6, 7, 8, 9; Code pénal, version consolidée au 16 décembre 2017 [French Criminal Code], articles from 113–2 to 113–13; Уголовный кодекс Российской Федерации от 13.06.1996 N 63-ФЗ (ред. от 19.02.2018) [Russian Criminal Code], articles 11, 12.

solution does not seem acceptable. The prohibition/order has a regulatory nature and its content must be recognisable at the time of the act. However, principles of criminal jurisdiction are based to some extent on uncertain future conditions (here one ought to indicate, for instance, the condition of gaining profit within the territory of a given state – a stringent protective principle, or staying in the territory of the state having committed the act – the principle of substitutive criminalisation). Here, it would be vital to interpret jurisdictional principles to allow one to explicitly determine if a given prohibition/order could be an element of a norm as early as at the time of the perpetrator's act or omission, which in turn would result in the state's competence being substantially limited.

The above problems do not occur if one assumes that a prohibition/order is subject to the very same rules as all other regulatory standard-setting expressions. In this approach, the limits of the "competence to set standards" of a prohibition/order would be defined by the state's competence to set standards' of specific social situations. However, this solution would lead to unacceptable consequences as well since, if the scope of the competence to set standards of a prohibition/order was dictated by the national legislative jurisdiction in the classic sense, in all cases where the presence of a jurisdictional nexus cannot be demonstrated, it would be impossible to consider a given conduct as illegal – therefore, it would be impossible to hold the perpetrator criminally liable. The reason is that in practice there are cases where the right to punish is executed with regard to the perpetrator who performed a conduct abroad in a situation where at the time of the act no legally relevant nexuses that would define the scope of legislative jurisdiction were determined (state X can punish a perpetrator of a car accident that occurred in the territory of the state Y, yet it cannot define road traffic regulations within that territory).

Given the above, neither examining the limits of validity of a prohibition from the perspective of legislative jurisdiction nor relating them solely to jurisdictional solutions provided for in the Penal Code gives satisfying results. The reason is that the analysed prohibition/order, which constitutes an element of a sanctioned norm, lies in-between the standard-setting power and the right to punish. In this regard, it seems that it should be subject to rules specific for both of these competencies to a relevant extent. Given the objective for which the prohibition/order is distinguished, the scope of the competence to set standards ought to

coincide with the scope of the power to execute criminal law objectives provided under *ius puniendi*. The very fact that such power exists results in a limited scope of competence to impact individuals' conduct by imposing penal norms. As long as such a prohibition operates within the limits of criminal law defined above, it ought to be considered binding – there are no factors that would prevent it from being introduced.

The limits of the “competence to set standards” of a prohibition/order are thus determined in an exceptionally broad manner, being in fact a reflection of the limits of competency to exercise the criminal law function in a regulatory manner (general prevention). The principles of criminal jurisdiction present in national law have no direct effect on their scope. The above solution also eliminates issues related to the limits of classic legislative jurisdiction. Simultaneously, considering that the content of a prohibition/order is made adequate by means of directives of conduct, which are also derived from foreign law, the threat of an infringement of the foreign state's sovereignty or human rights becomes virtually non-existent. In this case, the broad scope of the “competence to set standards” is neutralised by means of the content of a prohibition being relevantly narrowed by directives of conduct.

Moving onto the analysis of the scope of the “competence to set standards” of directives of conduct, one ought to note that it is defined using criteria that determine the limits of legislative jurisdiction. This problem was discussed above but now it is necessary to analyse it in the context of the prohibition/order. It is possible that because of application of the rule of reason, the directives binding in a particular case will be contradictory with the analogical directives derived from the legal system of the forum state. The question is whether the court of the forum state is obliged to derive the sanctioned norm from such a “contradictory directive”.

However, in the context of criminal liability one ought to note that particular directives of conduct serve various functions, whereas differences that occur in this regard should be considered when resolving the above problem. Basically, one can distinguish here two categories of situations.

It is possible that the discrepancy in terms of the content translates into a change in the right protection standard – let us take for example left- and right-hand traffic. Here, the dominant role should be given to

those directives of conduct whose competence to set standards is based on a territorial nexus. In essence, the thing is here only to choose a technical method for ensuring a proper standard of legal rights protection, whose effectiveness depends on respecting the very same rules by all participants of a given legal transaction.

In practice, a number of situations occur, though, where differences between the content of directives stem from discrepancies existing even at the level of the value system<sup>195</sup>. This is reflected in various scopes of protection granted to individual legal rights, where the situation can take two forms. Firstly, the standard of protection provided for in directives of conduct derived from the law of the forum state might be lower than the standard provided for in the law of the place of the act. Secondly, it might be the case that the law of the forum state has a higher standard of protection. In both cases, basing the scope of competence to set standards solely on directions specified in the rule of reason could lead to unacceptable consequences. The content of a prohibition/order would become adequate in a way that is contrary to the will of the society of the forum state. Therefore, it seems necessary to introduce proper corrections at the level of ensuring adequacy of the prohibition/order. The said corrections are void in international law, whereas introduction of such correction into the legal system ought to be an expression of a state's will as a sovereign entity.

In cases where the law of the place of the act provides for a higher standard of legal right protection (directives of conduct are more restrictive in this regard), the content of a prohibition/order is unduly narrow. For instance, when ordering the use of specialist security systems in cars

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<sup>195</sup> It is worth repeating in this place the statement of W. Wróbel [translation – DZ]: “It is the opinion of a certain subject that something is useful and something is not, something worthy of praise and something is reprehensible. Of course, the ethical system will try to absolutise its evaluation, trying defining some behaviour as reprehensible behaviour, independently from the social context. It is true that every legal system is based on a certain hierarchy of values. It is also true that it is a hierarchy of values of the legislator.” – Włodzimierz Wróbel, *Pojęcie “dobra prawnego” w wykładni przepisów prawa karnego* [The Concept of “Legal Good” In the Interpretation of Criminal Law], in *Aktualne problemy prawa karnego. Księga pamiątkowa z okazji Jubileuszu 70. urodzin Profesora Andrzeja J. Szwarca* [Current Problems of Criminal Law. Memorial Book on the Occasion of the 70th Birthday of Professor Andrzej J. Szwarz] 621 (Łukasz Pohl ed. 2009). In the case described above, there is a collision between these hierarchies of legislators.

or particularly durable construction materials, a foreign state limits the content of a prohibition/order to a much lesser extent than in the case of using directives of conduct that do not provide for this sort of requirements. If a conduct that does not correspond to a directive results in, e.g., a person's death, it should be assumed that conditions for illegality are fulfilled, resulting in the imposition of a penalty. This may lead to the conditions for criminal liability becoming separate from the value system of society in the name of which *ius puniendi* is exercised. Directives of conduct are examined in the context of their impact on a sanctioned norm of the forum state. The said norm affects judgements provided by a court of the forum state and not the state of the place of the act's execution. There are no conditions whatsoever that order the forum state to respect foreign norms to an extent that could lead to an unacceptable extension of a category of behaviour that is illicit under the national criminal law. Though a standard-setting expression derived from a foreign legal order may block execution of the right to punish, it cannot make a court of the forum state impose a penalty. In the examined situation, the contents of a prohibition/order ought to be narrowed in line with the standard of protection relevant to the forum state. Consequently, neither the perpetrator's powers (his or her freedom is thus expanded) nor powers of third states (their competencies to set standards or to punish are not excluded) become limited. Considering the above, one should advocate the possibility of disregarding excessively restrictive foreign directives of conduct in the process of ensuring the adequacy of a prohibition. Such a treatment is not considered an infringement of international law or the sovereignty of third states. The absence of classic jurisdictional nexuses also does not constitute any obstacle since it is proven in the paper that the binding effect of a prohibition against/order to undertake a given conduct is derived from the power to exercise the law to punish, which to a certain extent is also regulatory. In this case, the result is only a limitation of the prohibition whose binding effect is already determined. Consequently, it ought to be assumed that, in a situation where a directive of conduct that was interpreted based on foreign law introduces an excessively high (in the view of the forum state) standard of conduct in regard to a legal right, the prohibition should be made adequate by including relevant directives derived from the law of the forum state. Though they cannot regulate the very conduct of the perpetrator, they have the capacity to

shape conditions for criminal liability to some extent under the law of the forum state. Thus, the forum state would only limit itself in exercising the right to punish.

The other of the distinguished categories pertains to cases where the law that the perpetrator is bound to provides for a lower standard of legal rights protection, e.g., by permitting driving a car over 50 miles per hour or 90 km/h in a built-up area. Obviously, individual states attempt to ensure protection primarily over those legal rights that they consider most important, limiting the possibility of other rights as a result. The situation becomes complicated when an eligible state competent to set up directives of conduct introduces provisions that limit the scope of a prohibition/order in an excessive manner, e.g., by permitting rape in certain circumstances. A question arises as to the extent to which the forum state may disregard directives of conduct in the process of decoding a sanctioned norm, given that the said directives are provided for in foreign law, with the sole reason being that they lead to an excessive limitation of a prohibition/order. In this regard, the common denominator allowing for a decision to be made is human rights. Nevertheless, it should be assumed that, if a standard pertaining to legal rights protection established based on foreign directives remains in line with the minimum standard set up by human rights, the forum state cannot disregard these directives in the process of decoding a given sanctioned norm, as this would constitute a violation of the sovereignty of the eligible state competent to lay down norms. The power to disregard a directive and, hence, to extend a prohibition/order is formed only if it is found to be in conflict with human rights.

The matter of the contents of the human rights protection standard is naturally questionable since as of now it remains ill-defined and is characterised by culturally determined discrepancies<sup>196</sup>. It seems, though, that for that very reason states must make decisions regarding penalisation – it is the only way to provoke conflicts of jurisdiction that can be resolved on an international level, which in turn will allow clear rules to emerge in this regard.

A situation where the above-described solution ought to be applied without doubts in terms of being in conflict with human rights,

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196 Meron, *supra* note 83, at 79–81; Donnelly, *supra* note 83, at 89–106.

though with tremendous practical meaning, can be exemplified by an attacker who gets killed when acting under conditions of an honour killing<sup>197</sup>, which is still practised in certain locations worldwide. When assessing the conduct solely from the view of norms binding for the place of the act, the behaviour of the person attempting homicide must be considered legal, whereas the behaviour of the person who protected herself constitutes an illegal act. An assessment made in line with the norms of Western culture gives a totally different result. However, if one was to transfer these considerations onto the level of rules comprising the common human rights protection system, one ought to stress that the rule of conduct that permits the killing of a victim who dishonoured her family may be disregarded as not binding. The freedom of setting is limited not only by the sovereignty of other entities but also by commonly binding norms of international law (*erga omnes*<sup>198</sup>). Consequently, one

197 See: Amin A. Muhammad, *Preliminary Examination of so-called "Honour Killings" in Canada*, Cat. No. J4-23/2013E-PDF, [http://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/hk-ch/hk\\_eng.pdf](http://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/hk-ch/hk_eng.pdf); Jane Hailé, *Honour Killing, its Causes & Consequences: Suggested Strategies for the European Parliament*, Policy Department External Policies, December (2007), [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2007/385527/EXPO-JOIN\\_ET\(2007\)385527\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2007/385527/EXPO-JOIN_ET(2007)385527_EN.pdf). Particular attention should be paid to Art. 340 of the Jordanian Penal Code, in the version pre-2001: "He who surprises his wife, or one of his [female] mahrams committing adultery with somebody [in flagrante delicto], and kills, wounds, or injures one or both of them, shall be exempt from liability. ii). He who surprises his wife, or one of his female ascendants or descendants or sisters with another in an unlawful bed, and he kills or wounds or injures one or both of them, shall be liable to a lesser penalty [in view of extenuating circumstances]." – quote for: Suheir Azzouni, *Palestine Palestinian Authority and Israeli-Occupied Territories*, in: *Women's rights in the Middle East and North Africa progress amid resistance* 389 (Sanja Kelly & Julia Breslin eds. – 2010). See also: *Honoring the Killers: Justice Denied For "Honor" Crimes In Jordan*, 16 Human Rights Watch (April 2004). In the process of evaluating the validity of the norms, it seems necessary to define the nature of the exclusion of criminal liability itself, in particular to demonstrate that the legal system is exempted from the illegality of behaviour and not its punishment. In the latter case, behaviour can also be considered illegal under foreign law. The question is how to verify the nature of the exclusion. It may be useful to compare statutory provisions concerning the issue of self-defence and the tested exclusion of criminal responsibility. If their structure is similar, then they can be considered to have a similar character. See: Agnieszka Gutkowska, *Prawo karne wobec wyzwań wielokulturowości. Przestępstwa kulturowe na przykładzie wymuszonego małżeństwa* [Criminal Law and the Challenges of Multiculturalism. Cultural Crimes on the Example of Forced Marriage], in *Idee Nowelizacji Kodeksu Karnego* [Ideas of the Revision of Criminal Code] 243–248 (Marek Lubelski, Renata Pawlik & Adam Strzelec ed., 2014).

198 T. Meron, *supra* note 83, at 188–201; Katariina Simonen, *State versus the Individual. The Unresolved Dilemma of Humanitarian Intervention* 56–57 (Nijhoff 2011). The ef-

ought to conclude that the wording of the prohibition to kill has not been made adequate by involving the consent to commit an honour killing. The perpetrator's attack thus violates a sanctioned norm (being illegal), whereas the behaviour of the would-be victim is considered a necessary self-defence. In this perspective, considerations regarding the illegal nature of the woman's behaviour prove groundless by necessity.

A thus decoded sanctioned norm constitutes not only a directive of conduct but also a pattern of assessment of the perpetrator's conduct in terms of its illegal nature. In a situation where a given conduct proves contradictory to the disposition of the sanctioned norm, it is vital that the conduct is further verified in terms of other conditions for punishability specified by the sanctioning norm.

#### 4.2. Sanctioning norm in the international context

As it was said above, the sanctioning norm is the direct normative basis of imposing punishment. Its sole addressee is the court as an entity that decides on holding an individual who infringed a sanctioned norm criminally liable<sup>199</sup>.

This is crucial for determining the validity of the sanctioning norm as a norm that indicates conduct, as this does not pertain to an individual but to a legislative body that operates in a normative space exclusively. Thus, the judge, Mr X, is not bound to a disposition of a sanctioning norm, but the court that delivers the judgement on behalf of the forum state is. It is possible to precisely determine under procedural provisions in what circumstances the behaviour shall be treated as an act of a body or as the conduct of an individual. This will allow us to determine the category of conduct with the binding disposition of a sanctioning norm.

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fectiveness of the *erga omnes* standards had been confirmed by the rulings of the international tribunals: Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971; Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974; East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 200.

199 Kardas, Zbieg, *supra* note 92, at 275; Dąbrowska-Kardas, *supra* note 92, at 178; Pohl, *supra* note 92, at 28.



Moreover, considering that fulfilment of the order to impose a penalty requires taking conventional actions, whose validity is conditioned by a proper procedure and a relevant authorisation of the court to enforce the ordered activities<sup>200</sup> being maintained, it should be assumed that the limits of validity of a sanctioned norm in space cannot be broader than those of the court's authorisation to perform major conventional actions. In this regard, an exceptionally strong relationship between a sanctioning norm and procedural standards can be seen. Hence, sanctioning norms viewed as norms that order the imposition of a punishment for an aggravated infringement of a sanctioned norm should be considered to apply in a geographic space where national courts can operate. The scope of validity of that norm cannot be larger than the scope of powers of the national administration of justice.

In the light of the subject of this paper, determining the elements that comprise the sanctioning norm hypothesis seems most important, since exercising the said norm serves as a condition for the actualisation of an order to impose a penalty. This is because infringement of a sanctioned norm is merely one of these elements and not all cases where a prohibition or an order derived from the said norm is violated result in the actualisation of a sanctioning norm. Here, other elements not provided for in the content of the sanctioned norm are required to occur. Given the considerations made in this paper, those specified as principles of criminal jurisdiction seem particularly significant: the territoriality principle, active and passive personality principles, protective principle, the principle of universal jurisdiction, and the principle of *vicarious jurisdiction*. To some extent, these may be complemented with the above-mentioned dual criminality requirement.

One should note their dual normative character. On the one hand, they specify the content of a sanctioning norm, thus serving as the legal criteria of an indictable offence<sup>201</sup>. Here, the full role described by the symbol  $P_{sn}$  in the formula is specified by conditions of criminality, whose presence is vital for holding the perpetrator criminally liable<sup>202</sup> (the perpetrator's citizenship, recognition of the conduct as a crime under foreign

200 Kardas, Zbieg, *supra* note 92, at 275; Dąbrowska-Kardas, *supra* note 92, at 178–179.

201 Kardas, *O relacjach*, *supra* note 92, at 45; Kardas, Zbieg, *supra* note 92, at 275.

202 See: Włodzimierz Wróbel, Andrzej Zoll, *Polskie prawo karne. Część ogólna* [Polish Criminal Law. The General Part] 139 (2010).

legislation, etc.). On the other hand, they constitute distinct metanorms ( $N^m$ ) that affect the interpretation of all elements of a sanctioned norm<sup>203</sup>, thus serving as framework provisions<sup>204</sup>; in this regard, they determine, among others, the application area of the criminal law, etc.

It should be noted that the principles of criminal jurisdiction do not limit the validity of a norm in space in so far as regarding limits set by legally relevant nexuses. They do not determine in any way the applicability of the norm in space, but contribute to the hypothesis of a sanctioning norm. The limits of the validity of sanctioning norms viewed as norms that impose certain actions to be executed by the court must be determined in isolation from criteria provided for in the principles of criminal jurisdiction. A court of state X cannot be said to be bound to a sanctioning norm in situations where the judgement is delivered within the territory of the said country, in respect of the citizen, etc. Authorities of a given state may have its bodies bound to the norms of any content in so far as they remain within the limits set by international law. In this view, the principles of criminal jurisdiction affect only the content of a sanctioning norm and not its spatial validity. At the same time, jurisdictional principles themselves constitute solely a certain proposition of how such conditions could be described. The state can form them as it wishes as far as it remains within the limits of its *ius puniendi*, as sanctioning norms constitute a result of exercising the law and have no regulatory nature from an individual's perspective. The competencies to set such standards ought to be considered part of the exclusive powers.

## 5. How it works in practice

To examine the above method of interpretation of penal norms, it will be useful to discuss the case of Mr John Doe, briefly presented in the introductory part. To make things clearer, let us assume that under the “pure” X law (without international context) he committed the crime of incitement to murder. Under the “pure” Y law, his act was legal because of the above-mentioned “transplantation provisions”. None of these states

203 Kardas, Zbieg, *supra* note 92, at 275; Dąbrowska-Kardas, *supra* note 92, at 222.

204 Dąbrowska-Kardas, *supra* note 92, at 78–87. The resemblance between the principles of criminal jurisdiction and the rules of intertemporal law can be seen on this background – see: Wróbel, *supra* note 92, at 489–490.

provides any special regulation of the spatial extent of the validity of domestic norms.

The question is: is it possible to impose the punishment on Mr Doe for his act committed in Y state?

As a first step, the content of the sanctioned norm that was binding Mr Doe during his behaviour has to be established. As previously explained, the prohibition/order must be interpreted by the legal system of the forum state – on the basis of the analysed case, under the law of X. It is beyond any doubt (under argumentation presented above) that state X has the power to execute the *ius puniendi* against Mr Doe. Thus, in this scope the sanctioned norm gets the foregoing form: “No one is allowed to incite anyone to cause the death of a human...”

The second element of the sanctioned norm is the directives of behaviour. In the subject case many such directives are in force. From the perspective of the topic of this work, the most important is this one that contains the permission for causing death because of organ donation (under Y law), in the foregoing form: “..., unless such act is undertaken for the purpose of commercial transplantation of organs, etc.” It is necessary to establish whether the above directive has to be taken into account in the process of an interpretation-sanctioned norm.

To achieve this goal, in the beginning, it is necessary to analyse all of the jurisdictional links existing in the above case. The nexuses of territory and citizenship of the victim are arguments for the strong legislative jurisdiction of Y state. On the contrary, the competency of state X is based only on the formal bonds with the perpetrator. But the assessment of the weightiness of jurisdictional links has to be done *in concreto*. In this way, the territorial nexus is used by Mr Doe instrumentally – not to protect the cultural standard of the region but for formal justification of unjust behaviour. What is more, even such standard does not deserve protection – it is contrary to human rights, especially human dignity and the right to live. Because of that fact, from the perspective of international standards, it is possible to reject the usage of the analysed directive in the process of interpretation of the sanctioned norm.

Analysing this issue from the perspective of internationally protected values, it has to be noted that neither sovereignty of state Y nor human rights will be breached by the proposed solution. Mr Doe is aware of the illegality of his act – it is a reason for his travel to state Y. He is not protect-

ed by the principle of *nullum crimen sine lege*. On the other hand, state Y has no right to enforce the law, which allows homicide for the purpose of transplanting organs. It is contrary to commonly accepted human rights principles. In consequence, enforcing the law of state X, which is contrary to the above directive, cannot be treated as an infringement of the sovereignty of state Y.

In consequence, the prohibition, “No one is allowed to incite anyone to cause the death of a human...”, shall be treated as binding and Mr Doe has to obey the sanctioned norm, based on the above prohibition.

Of course, as previously stated, both the scope of sovereignty and the standard of human rights protection are not precisely defined. But they can be established only in the course of enforcement of the law. It is true that such an approach can lead the state before the international courts, but only in this way is it possible to develop universally acceptable grounds of criminal responsibility for crimes committed abroad.

From the perspective of the sanctioning norm, it has to be noticed that Mr Doe is a citizen of state X. In this case the principle of nationality is binding. Assuming that the above principle is included in the criminal code of state X, the domestic court is obliged to impose the punishment on Mr Doe. Of course, state X can introduce a modification of the principle, for example, by connecting it with the requirement of double punishability. A concrete shape of extraterritorial jurisdiction depends on the political vision of a state.



## Conclusion

Owing to the analysis of the conditions of establishing criminal liability for indictable offences perpetrated abroad from the perspective of the theory of conjugated norms, it is possible to put individual elements that limit the scope of validity of individual standards of conduct into a single framework of a broader construct that basically covers all aspects of criminal liability. As a result of the adoption of the above solution, the content of a sanctioned norm becomes disconnected from the rules of criminal jurisdiction in the classic sense. This, in turn, implies the necessity to carry out a dual assessment of the perpetrator's conduct. The content of the sanctioned norm to which the perpetrator was bound at the time of the act should be determined in the first place. Only then is it acceptable to state that the analysed behaviour was an illegal act. The next step is to verify the punishability of the behaviour, provided that the only condition that limits the application of national assessment criteria is the sovereignty of foreign states and human rights. In this regard, one may distinguish three stages of the reasoning that ought to be delivered by the court in order to determine whether the perpetrator can be held criminally liable in a given case. These can be described as follows.

1. Determining the scope of the "competence to set directives" of an order/prohibition, one ought to examine whether a given prohibition is valid as a binding directive of conduct in any scope whatsoever without infringing the sovereignty of a third state, with the

need to respect the sovereignty of third entities and human rights as a criterion;

2. Ensuring the adequacy of the content of a prohibition/order by means of determining directives of conduct to which the perpetrator is bound to in so far, since the content of the prohibition can be subjected to adjustments due to excessively restrictive foreign norms or due to the need to protect values protected by human rights;
3. In the event that the thus reconstructed standard of conduct is infringed by the perpetrator's behaviour, verifying other conditions for establishing criminal liability provided for in the national criminal legislation, which comprise the sanctioning norm.

The above-presented model of decoding penal norms in the broad sense allows the right to punish to be executed on a broad basis within limits set out by international law for legislative jurisdiction and with *ius puniendi* taken into account. The practical use of the thus decoded norms will obviously depend on the specific procedural conditions being met. Still, this matter is beyond the scope of these considerations.

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